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A

# REPORT

Of Select

# CASES

IN *J. D. Lincoln*  
*Chancery, the King's Bench, &c.*

In the Fourth, Fifth, Sixth and Seventh Years of his present Majesty King GEORGE the Second; during which Time Lord *King* was Lord High Chancellor of *Great Britain*, and the Lord *Raymond* and Lord *Hardwicke* were Lord Chief Justices of *England*.

*J. Valpy*

With TABLES of the NAMES of the CASES and the PRINCIPAL MATTERS.

In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of *Edward Sayer, Esq;*) for John Worsall at the Dove in Bell-Tard near *Lincoln's Inn*. MDCCXL.



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CHANCERY  
NAMES of the CASES in

1. **Churches (Duke of)** & Co.,  
 2. **London and West**  
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*Cases adjudged in CHANCERY.*

*Dobbins versus Bland.*

*In Canc' coram King Chancellor, June 13. 1730.*

*4 Geo. II.*

**T**HIS was a Bill, brought for Payment of a Legacy, ( 1. )  
against the Defendant as Executor of *John Hyett*. Bill for Pay-  
*John Hyett*, by Will 5 Sept. 1719. *inter al*, devised ment of a  
unto the Plaintiff *Elizabeth*, by the Name and De- Legacy a-  
scription of his Grand-daughter *Elizabeth Hyett*, the Sum of gainst De-  
2500 *l.* to be paid her when she should attain her Age of fendant as  
twenty-one Years, or be married with the Consent of his Executor.  
Executors or the Survivor of them; and such Consent to be  
testified in Writing under their Hands, and not otherwise.

The Testator also gave and bequeathed unto the Plaintiff *E-*  
*lizabeth* the annual Sum of 100 *l.* for the Term of five Years,  
to commence from and after her Marriage with the Consent of  
his said Executors and Trustees, as aforesaid, if the Plaintiff  
should so long live. The first of which said annual Pay-  
ments he willed should begin and be made unto the Plain-  
tiff at the Expiration of the first Year after such her Mar-  
riage with Consent, as aforesaid. The Plaintiff *Elizabeth*  
intermarried with the Plaintiff her Husband after she attained  
the Age of twenty-one Years; and the Executors paid the  
Legacy of 2500 *l.* because the Words as to that were in the  
Disjunctive, *viz.* when she attained her Age of twenty-one  
Years, or be married with the Consent of his Executors.  
So that the Assent of the Executors was not necessary, in case  
she married under the Age of twenty-one Years.

And the Question was now only as to the 100 *l.* for five  
Years; and it was insisted, she having married the Plaintiff  
without the Consent of the Executors, she should never be  
intituled to the said 100 *l.* for five Years. Tho' in this Case  
there is no Limitation over in case she married without  
Consent; yet this is not a Restriction only *in terrorem*, but is  
a Condition precedent; and a Court of Equity cannot dis-  
pense with the Non-performance of a Condition precedent.  
The Words are, "To commence from and after such her  
Marriage with Consent of his said Executors and Tru-  
stees, as aforesaid"; and that has Reference to the for-  
mer



mer Words where the Consent is directed to be testified in Writing.

*King* Chancellor inclined to be of Opinion, That the Plaintiff *Eliz.* by her Marriage without Consent, &c. had lost this Legacy of 100 l. for five Years, and that this was a Condition precedent; but the Residuary Legatee, who was an Infant and Heir at Law, not being before the Court, it was ordered to stand over. *Vide 2 Vern. 293. Garrett & Ux' versus Pritty & al'. Note:* This is not a Gift defeasible on a Condition subsequent, but to commence upon the Performance of an Act which was to be performed. *2 Vent. 339. 2 Vern. 572.*

### Goodall versus Rivers & al', 4 Geo. II.

(2.) THIS was a Bill brought by the Plaintiff, who married one of the Daughters of Sir Thomas Rivers, wherein several other Daughters of Sir Thomas Rivers were Plaintiffs also, and Sir George Rivers and the surviving Trustees (for a Term of Years comprised in Sir George Rivers's Marriage-Settlement,) were Defendants.

Bill to oblige  
the surviving  
Trustee to  
pay Portions.

And the Bill was to oblige the surviving Trustee to pay the Plaintiffs their Portions, with Interest from the Time they became payable, and also a considerable Arrear which was allotted to them for Maintenance, by Sale of a Term during the Life of the Defendant Sir George Rivers their Father. The Case was as follows: Sir George Rivers, after his Marriage with Dame Dorothy his Wife, executed certain Articles which were recited to be made in Pursuance of a verbal Agreement between them two before Marriage, and by the said Articles agreed to make a Settlement of certain Lands to the following Uses, *viz.* To the Use of Sir George for Life; Remainder to Trustees therein named, during the Life of Sir George, to preserve contingent Remainders; Remainder to Dame Dorothy his Wife for Life for her Jointure; Remainder to the first and every other Son in Tail Male; Remainder to Trustees for 500 Years; Remainder in Fee to Sir George Rivers. And a Marriage-Settlement was afterwards made in Pursuance of the Articles, and the Trust for 500 Years was declared as follows, *viz.* That the said Term of 500 Years was so limited in Trust, that in Default of Issue Male of the said Sir George by Dame Dorothy his Wife, the said Trustees, their Executors, &c. should and might, either by and out of the Rents and Profits of the said Premises so limited after the Commencement of the said Term of 500 Years, or else by Lease or Sale, or Mortgage of the

the same, or any Part thereof, (except a Particular Part therein excepted,) for 500 Years, or any lesser Term, when and in such Manner as the said Trustees or the Survivor of them, his or their Executors, should think fit, to raise the several Sums for the Portions, and for Maintenance and Education of such Daughter or Daughters, as herein after expressed, (that is to say) if there be but one such Daughter that should attain the Age of twenty-one Years, or marry, the Sum of 2000 l. and if two, 5000 l. and if three or more Daughters which should attain that Age, or be married, 6000 l. equally to be divided amongst them; and also the yearly Sums therein after mentioned for their Maintenance and Education; and the said Portions to be paid them at nineteen Years, or when they should be married, with Interest at 4 l. per Cent. for their Maintenance from the Death of Sir George or Dame Dorothy, which should first happen, until their Portions became payable.

Sir George Rivers had Issue two Sons by his Wife, and both the said Sons are dead without Issue Male, the youngest of which died 1727. so that now here is a Term vested in the Trustees; for the Term was limited to them upon Failure of Issue Male. The Case of *Butler versus Duncombe*, 2 Vern. 760. was cited; and likewise Sir Tho. Jones 201. and a Case in Point *rotidem verbis*, 1 Salk. 159.

King Chancellor: The Words, *After the Commencement of the Term*, govern the Trust, in the Case of *Butler and Duncombe*; and here the Words, *from and after Default of Issue Male*, govern the Trust; but as the Term does not vest in the Trustees till Failure of Issue Male, till then no Interest ought to be paid for the Portions, which is from the Year 1727. The Dame Dorothy died long before; and decreed the 500 Years Term expectant upon the Determination of the Life-Estate in Sir George Rivers to be sold before a Master; and if there was any Surplus remaining after Payment of the 6000 l. with Interest, then such Surplus to be paid to Sir George Rivers who had the Inheritance.

*Vide Brome versus Borkley*; House of Lords Cases. 2 Vern. 458. *Gerrard versus Gerrard*. 2 Vern. 460. *Stanisforth versus Stanisforth*.

## Harvey versus Woodhouse & al, 4 Geo. II.

THE Plaintiffs were the Appointees of the *Cestui que Trust* (3.) in a Defeasance of a Judgment acknowledged to A. by two Connuzees; one of the Connuzees died soon after the Judgment



Judgment acknowledged; the Survivor died in the Life-time of the Conuzor, and made the Conuzor his Executor, by which the Judgment at Law was extinguished; whilst this Judgment was thus suspended, the Conuzor aliened Part of the Land to B. for a valuable Consideration, and by a Conveyance after Marriage settles the other Part upon his Wife and Children. *Note*; There was a Recital of a Marriage-Article in the Settlement, but no Articles were proved.

Bill to have Satisfaction for a Judgment out of the personal Assets.

This Bill was now brought, the Conuzor being dead, against his Executors, against the Heir at Law, and against the Wife and Children, and against the Purchaser, to have a Satisfaction for this Judgment out of the personal Assets, and if they fall short, out of the Purchaser's and the settled Estate.

*Dr.* — But it appearing the Purchaser had no Notice of the Judgment, the main Question was, Whether the whole Estate of the Volunteer shall be subject to this Judgment, or only a Moiety as would have been liable at Law, taking this Settlement to be voluntary. It was argued, that the Estate in the Hands of the Volunteer did not exceed a Moiety of the whole Estate which the Conuzor had at the Time of the Judgment, and before the Suspension of it; so that as once that might have been taken by the Sheriff, it ought to be still liable in Equity, and sold for the Satisfaction of the Judgment.

It was afterwards moved in Behalf of the Conuzor's Widow, that she might be at Liberty to prove a Copy of her Marriage-Articles; it was said that they were recited in the Settlement, and it would be hard, if this was a Provision before Marriage, that she should be deprived of it.

That this Court after a Cause is heard often directs a Will to be proved, and that is not merely an Exhibit; for there the Sanity of the Testator, or whether it was duly attested, was to be litigated.

On the other Side it was said, that this Cause has been heard, and only stands for Judgment; and no Instance, where the Court will give Leave, after the Hearing, to prove that which, if made out, will not be Evidence; for a Copy of Articles is not Evidence without some other Account given of the Articles themselves.

*King Chancellor*: I have considered of this Case, and determined with my self what Decree to make. And I think the Lands must be extended in Equity *in equali jure* as at Law, and all the Lands comprised in this Settlement may be taken. If a Conuzee aliened Part of his Lands, and Part descends, the Part that descends may be extended; and the Heir shall not have Contribution against the Alienee; and if the present Defendant, who claims under the Settlement, is only a Volunteer, she ought to be considered as an Heir. But

I am

I am not satisfied that this is a voluntary Settlement; and therefore referred it to the Master, to see if any Marriage-Articles were executed, and when, and upon what Consideration.

Lady Abergavenny *versus* Lady Abergavenny, 4 Geo. II.

PLaintiff filed a Bill against Defendant, to which Defendant put in an Answer; the Plaintiff's Bill was twice after amended, and Discovery of new Matter required; Defendant put in a Plea and Demurrer in Bar of such Discovery; which being over-ruled, the Defendant was in Contempt to a Sequestration for want of an Answer. The Plaintiff said the Sequestration had been executed a Year ago, and therefore moved, that the Bill might be taken *pro Confesso* for want of an Answer, alledging, that by the Practice of the Court, whenever a Defendant has appeared, and the Process of Contempt for want of an Answer is carried to the End of the Line, the Bill may be taken *pro Confesso*; or otherwise there would be a Failure of Justice, when a Matter is inquired of which lies only within the Knowledge of the Defendant, and of which the Plaintiff can have no other Discovery but by the Defendant's Oath. But it was objected, here was a sufficient Answer to the original Bill; and no Precedent could be produced, that where any Part of a Bill was answered, the Residue might be taken *pro Confesso*.

(4.)  
Motion a Bill might be taken *pro Confesso* for want of an Answer.

King Chancellor: If an Action at Law be brought to several Trespasses, and the Defendant's Plea goes only to Part, Plaintiff may sign Judgment as to all the Rest; and here *pro tanto* of the amended Bill that is not answered, it may be taken *pro Confesso*. *Sed Adjournatur*.

Note; When a Defendant is in Contempt for want of an Answer, and an insufficient Answer is put in, that is no Answer at all; and the Plaintiff is not to begin his Process *de novo*, but go on regularly from the last Process.

Bedford *versus* Backhouse, Nov. 26.  
1730, 4 Geo. II.

THE Case was: A Man had made a Mortgage of Lands in *Middlesex*, and the same was duly registred; afterwards he made a Mortgage to another Person, which

(5.)



Lands mort-  
gaged in  
Middlesex,  
and regi-  
stred, whe-  
ther the first  
Mortgagee,  
advancing  
a further  
Sum after a  
second Mort-  
gagee, shall  
take place.

was also registred according to the Statute; and after the making that second Mortgage, the first Mortgagee advanced a further Sum of Money to the Mortgagor on the Premises, without Notice of the second Mortgage; and the Question was, *Whether the Registry of the second Mortgage was constructive Notice, so as the Money lent subsequent to it should not be paid off till that was satisfied; and it was held by King Chancellor, that it was not*; for the Statute declares Deeds not registred void as against Purchasers, but gives no greater Efficacy to Deeds registred than they had before the making of the Statute; and it is a known Rule in the Court of Equity, that when a first Mortgagee advances a further Sum of Money (without Notice) after a second Mortgage made, that he shall be paid his whole Money in the first place.

### Anonymus, Nov. 16. 1732. 4 Geo. II.

( 6. ) **T**HE Words of a Will were, " I give and bequeath my Lands, Tenements and Hereditaments to my Wife, to be divided and disposed of amongst my youngest Children"; and it was held *per Jekyll* M. R. that the Word *disposed* related to the Estate of the *Devisor*; for that the Lands could not be disposed of, but the Estate, and consequently the Wife had a Fee.

The Word  
*disposed* re-  
lated to the  
Estate of the  
Devisor.

### Williams *versus* Sawyer & al', Nov. 17. 1730. 4 Geo. II.

( 7. ) **I**T was said *per Jekyll*, and so decreed, that where a voluntary Bond is given by the Husband to Trustees for his Wife's Benefit, that a Court of Equity will postpone such Bond even to Debts on Simple Contract, but will admit it to be paid before Legacies.

Voluntary  
Bond by the  
Husband to  
Trustees for  
Wife's Be-  
nefit, to be  
paid before  
Legacies.

### Anonymus, Pasch. 4 Geo. II.

( 8. ) **O**N Motion to supersede a Commission of Bankruptcy, the petitioning Creditor was only Assignee of an Obligee. And *per King* Chancellor, He is not a Creditor that can assign a Commission of Bankruptcy, the petitioning Creditor only Assignee of an Obligee, not a Creditor that can take out a Commission.

take out a Commission; it must be a Creditor in Point of Law, and not one who has only an equitable Right: The Obligee is Trustee for the Assignee, and at Law he must sue in his Name. Declaratory Clauses in Temporal Laws may be perpetual, as that Graziers, Farmers, &c. cannot be Bankrupts, as mentioned in the Statute Geo. 1. tho' the Act be expired.

Thoroton *versus* Blackborne & al,  
May 12. 1731. 4 Geo. II.

**W**illiam Hewett Esq; being seised and possessed of a large Real and Personal Estate, on the 9th of Sept. 1715. made his Will, and after several Bequests devised all his Freehold, Manors, Lands and Hereditaments, and all his personal Estate to Trustees, and their Heirs, &c. upon Trust they and the Survivor of them, and the Heirs of such Survivor, should with all convenient Speed convey the said Freehold Premises to his Godson *Hewer Edgeley* for Life *sans* Waste; Remainder to Trustees, to preserve contingent Remainders; Remainder to the first and every other Son of *Edgeley* in Tail Male; Remainder to the Daughters of *Hewer Edgeley*, and the Heirs of their Bodies, as Tenants in Common; with a Power to *Hewer Edgeley* to make a Jointure upon any Wife, so that it exceed not a Moiety of the Estate: And directed, that his personal Estate so devised to Trustees, and the Produce thereof, as soon as any considerable Part thereof could be got in, should be disposed of in the Purchase of Lands and Tenements of Inheritance, and be settled to the same Use with the Freehold Premises; and in case *Hewer Edgeley* should die without leaving Issue behind him, or if such Issue should happen to die without Issue, then his Will was, that his real Estate, and the Estate to be purchased with his personal Estate, should be so settled, that in case his Kinswoman *Anne Edgeley* should be then living, that she should enjoy the Rents of his whole Estate for Life; and after her Decease, one fourth Part thereof was to be enjoyed by *William Blackbourne*, his Heirs and Assigns; one other fourth Part by *Abraham Blackbourne*, his Heirs and Assigns; one other fourth by *Anne Jackson*, her Heirs and Assigns, and the remaining fourth Part by *Susanna Edgely*, her Heirs and Assigns; and directed, that in case any of them the said *William Blackbourne*, *Abraham Blackbourne*, *Anne Jackson*, and *Susanna Edgely*, should happen to be dead at the Time when by Virtue of the said Settlement the whole Estate

( 9. )  
Devise of  
Freehold  
Manors,  
Lands, &c.  
upon Trust  
to convey,  
&c.



state should devolve upon them, that then the fourth Part to which the Person so dead would have been intitled to, if living, should be conveyed to the respective Heirs of the Person so dead.

The Testator died soon after making his said Will, and shortly after *Hewer Edgeley* married, and made a Jointure according to the Power given by the Testator's Will. *Abraham Blackbourne* made his Will 16 March 1709. and made his Wife *Mary* Residuary Legatee and sole Executrix; and on the 16 Feb. 1720. duly made a Codicil to his Will, and after, reciting the Devise to him by *William Hewer* of the fourth Part of his Estate, under the Contingencies of his Will, the said *Abraham Blackbourne* devised, that whenever the fourth Part should come to his Son and Heir *Lewett Blackbourne*, or to such other Person as should be his Heir, the same should be charged with the Payment of 12000*l.* to his Wife *Mary Blackbourne*, and 3000*l.* a-piece to his three younger Children, and died soon after making such Codicil. And *Mary* his Widow soon after married with the Complainant *Thoroton*. On the 17 Feb. 1729. *Anne Edgeley* died, and on 6 Nov. 1728. *Hewer Edgely* died without Issue; and in *Hilary* Term 1729. the Complainant *Thoroton* and *Mary* his Wife, and her three younger Children by their next Friend, brought their Bill against *Lewett Blackbourne*, the Heir at Law of *Abraham*, & al<sup>s</sup>, to have the 12000*l.* and 9000*l.* raised out of *Abraham's* fourth Part of the Estate of *W. Hewett*. And it was objected by Defendant's Counsel, that the Charge made thereon by *Abraham* was void; for the fourth Part vested in the Heir of *Abraham* as a Purchaser, *Abraham* being dead before the Settlement made, and before the Estate devolved upon him; and his Will created two distinct Contingencies, viz. to *Abraham*, if he should be alive at that Time, if not, to his Heir. This therefore not being a Remainder vested in *Abraham*, is not subject to the Charges made upon it by his Will. *King* Chancellor said, that the first Part of the Will gave a Fee to *Abraham Blackbourne* of a fourth Part, upon the Contingencies there mentioned, and therefore it became a vested Remainder; and the latter Clause or Proviso did not restrain the Devise, but was directory only to the Trustees how to convey, in case the Parties who were to take the Benefit died before the Settlement made. Another Question arose, whether a Day should be given to *Lewett Blackbourne* (he being an Infant) to shew Cause against the Decree; and it was held, that were the legal Estate in Trustees, and not in the Infant, and an Execution of the Trust is to be directed, that there is no Occasion that a Day should be given; and the Money was therefore decreed to be raised, and

and no Day given to the Infant to shew Cause against the Decree. *Vide 2 Vern. 429. Coke versus Parsons.*

## Vernon ver. Vernon, Pasch. 4 Geo. II.

1731.

**H**ENRY Vernon being at Aleppo in Turkey, and possessed of a large personal Estate, in the Year 1694. made his Will, and thereby devised some particular Legacies, and gave the Residue of all his moveable Goods, &c. to his Brother Thomas Vernon; but if he died without Heirs Male of his Body, then he devised the Legacy given to Thomas to be divided equally between his other Brothers George and Charles Vernon, and made his Brother Thomas Vernon his Executor; but in case Thomas should die first, he appointed his Father Sir Thomas Vernon his Executor; and desired, that each of them (in the Name of God) would see his Will performed. The Testator died soon after, and Thomas his Brother proved his Will in 1695. and possessed his personal Estate and Effects; and afterwards, being in Treaty for a Marriage, in Consideration thereof and of the Marriage-Portion, and that certain Lands of the intended Wife were agreed to be settled, he enters into Articles under his Hand and Seal, and thereby covenants with Trustees to purchase Lands of the yearly Value of 350 *l.* within fifty Miles of London, or in the County of Chester, out of an Estate formerly belonging to the Vernons; and which when purchased were to be settled to the Use of himself for Life; and after his Decease, Part thereof to the yearly Value of 150 *l.* was to be settled to the Wife for Life, in Bar of her Dower, and the Residue to Trustees for ninety-nine Years, determinable upon the Death of the Wife; and from and after her Decease, to the Use of the first and other Sons of the Marriage in Tail Male; Remainder to the Heirs Male of the Body of Thomas, with Remainder to George Vernon for Life; Remainder to his first and other Sons in Tail Male, with Remainder to Charles Vernon for Life; Remainder to his first and other Sons in Tail Male, with Remainder to the right Heirs of Thomas.

*Note;* Sir Thomas Vernon the Father was a Party to and executed the Articles, but did not grant any Estate thereby, or covenant to make any Provision for his Son, nor did it appear that he parted with any Thing to his Son on Account of the Marriage. The Marriage took Effect soon after the Date of the Articles, and Thomas had Issue by his Wife three

D

Daughters



Daughters, and no Son, and *Thomas* did not purchase any real Estate in Pursuance of the Articles; but in the Year 1726. made his Will in Writing, and gave each of his Daughters 5000 *l.* a-piece, and made his Wife *Jane* Executrix and Devisee of his real and personal Estate, subject to his Debts and Legacies, and soon after died.

*George* and *Charles Vernon* sent to the Widow to make a Purchase and settle it according to the Articles; who (before she had advised) returned Answer, she would do it in convenient Time, and that her Husband had directed her so to do; but she afterwards refused; and thereupon *George* and *Charles Vernon* brought a Bill against her for a specifick Performance of the Articles.

Bill for a specifick Performance of Articles.

Counsel *pro Quer* insisted, that it did not weaken the Plaintiffs Title, that they were not Parties to the Articles; for if a Remainder is limited by Deed to any Person not a Party, it is not to be questioned but such a Remainder is good; that the Covenant entred into by the Articles, for the Benefit of *George* and *Charles Vernon*, was made upon a good Consideration, and it was intended thereby to keep up the Name and Family; the Father was a Party thereto, and would not have otherwise consented to the Marriage; and *Thomas*, who entred into the Covenant, had an Eye and Regard to his Brother *Henry's* Will; and altho' the Devise over to *George* and *Charles* was void, yet it was sufficient to bind the Conscience of *Thomas*. And Courts of Law and Equity will allow such Things to be a good Consideration, tho' the Parties are not compellable otherwise to do the Act. As if there are Creditors upon whose Deaths the Statute of Limitations has run, and afterwards an Executor or Administrator promises to pay them; such a Promise shall bind, and shall not be accounted a *Nudum pactum*. And they quoted the Case of *Osgood* versus *Stroud*, which had been heard by Lord *Macclesfield*, and afterwards reheard by his present Lordship.

Vide Cases in Law & Eq. 533, 534.

Mr. Solicitor General *Talbot & al contra*. That the Covenant whereof the Plaintiffs prayed a specifick Performance was voluntary; and that this Court had in no Instance decreed a specifick Performance of a voluntary Covenant; that it did in no wise alter the Case; that Sir *Thomas* the Father was a Party to the Articles, he was made so out of Respect and Reverence to him, but no Consideration could arise from thence; for that he granted nothing, nor did he covenant to do any Thing for his Son; which was otherwise in the Case of *Osgood* versus *Stroud*; that there was no Occasion in the present Case, nor could it stand in Reason to seek out and cast about for what Consideration the Articles were made,

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the Considerations are expressed therein, & *expressio unius est exclusio alterius*; nor can it be said with Reason, that *Thomas* had Respect to his Brother *Henry's* Will at the Time of making the Articles; for the Limitations in the Articles do not pursue the Limitations in *Henry's* Will, but are evidently different; and if the now Plaintiffs had brought a Bill against *Thomas* for the Performance of the Articles, the Court would not have decreed it; for it would have been in *Thomas's* Power to undo it the next Day; and cited the Case of *Beltingham* versus *Lowther*, 1 Chan. Ca. 243. and the Case of *Thompson* and *Lord Eversham*, Trin. 1715. Lord *Eversham* covenanted with *Thompson* to present his Son to a certain Benefice when it became void, and he had the Estate; the Event happened, and Lord *Eversham* refused to present *Thompson's* Son; and he brought a Bill to compel the Performance; but the Bill was dismiss'd with Costs, it being a voluntary Covenant.

King Chancellor: He did not apprehend that all voluntary Covenants were not to be compelled to a Performance; but he doubted whether this was a voluntary Conveyance; *Thomas* must be supposed to have Regard to his Brother's Will at the Time of making the Articles; and accordingly decreed a specifick Performance. *Quare* as to this Decree.

Man versus Man, May II. 1731.  
4 Geo. II.

Coram Jekyll Master of the Rolls.

*Sampson* Man, being possessed of a personal Estate, on the 18th of December 1718. made his Will, and thereby gave all the Interest, Use, Profit and Benefit of his personal Estate to his Wife *Agatha* for her Life, during her Widowhood, and after her Death directed that his personal Estate should be divided equally between his Brother *Benjamin* and his Sisters *Lydia*, *Mary* and *Elizabeth*, and made his Wife sole Executrix. *Mary* and *Elizabeth* died before the Testator, and he dying in 1727. his Widow proved his Will and possessed his Effects. *Benjamin* and *Lydia*, the surviving Residuary Legatees, brought their Bill against the Widow and Executrix for an Account of the Testator's personal Estate, and that the whole might be secured for the Purposes in the Will.

( II. )  
Interest, Use,  
Profits, &c.  
to a Wife  
for Life.

Bill against  
the Widow,  
that the per-  
sonal Estate  
might be se-  
cured for the  
Purposes in  
the Will.

It was agreed in arguing this Case, that the surviving Legatees were intitled only to two fourth Parts of the Testator's Estate upon the Contingency in the Will; and the sole Question



Question was, whether the Executrix should take the two remaining fourth Parts to her own Use, or whether they should be distributed according to the Statute.

*Talbot* Solicitor General argued, that the Testator did not mean that the Executrix should have more than the Use and Profit of his Estate during her Widowhood, for that he had disposed of the whole by his Will, and therefore that the Shares of the Legatees who died before the Testator were distributive according to the Statute.

*Mead pro Def* argued, that where the Intent does not plainly appear, that the Executrix should not take any Benefit by the Will, but what is therein expressed, the Law ought to take place; and by Law the Executrix is intitled to what is not partly disposed of; that it did not follow, because the Testator had given the Use of his whole Estate to his Wife for Life, that she should stand as a Trustee for the next of Kin, in case any of the Legatees died before the Testator.

*Jekyll M. R.* said, this Court had considered the Executrix as a Trustee for the next of Kin, chiefly in Cases where the Testator had not disposed of his whole Estate at the Time of his Will, but had left Part undisposed of.

That the Testator in this Case had disposed of the whole; and it was natural for him to suppose, that making his Wife Executrix intitled her to the Shares of the Legatees dying before him; for otherwise he might have prevented it by a Codicil, had he thought fit. And decreed, that the Defendant the Widow was intitled to a Moiety in her own Right; and directed, that the other Moiety of the Estate should be brought into it, and secured for the Purposes in the Will.

*Note*; This Decree was afterwards affirmed in the House of Lords 1731.

### Willing *versus* Baine, June 21. 1731. 5 Geo. II.

(12.)

*Dorothy Baine* by Will 1723. gave a Legacy of 200*l.* to *Mary Billing*, 300*l.* to another Legatee, 100*l.* to a third Legatee, (all Infants) payable at twenty-one, and if either of them died before twenty-one, then his or her Legacy to go to the Survivor or Survivors; and one of the Legatees died in the Life-time of the Testator; and the Question was, whether this was a lapsed Legacy, or should go over to the other Legatees.

Legacy, whether lapsed.

*King Chancellor:* A Legacy is lapsed where there is no Person to take according to the Will; but if it can take Effect according to the Will, the Legacy cannot be lapsed; here it may take Effect; as if Lands are devised to *A.* for Life, and after to *B.* though *A.* dies in the Life-time of the Testator, *B.* shall take; and so decreed, that the Legacy should go to the other Legatees. *Vide 2 Vern. 207.* a Case in Point. *2 Vern. 467, 611.* The Legacy also shall carry Interest from the Time of the Death of the Testator.

Attorney General *versus* Hall, July 5.  
1731. 5 Geo. II.

**T**HOMAS Hall by his Will bearing Date 16th of Feb. ( 13. ) 1717. devised (*inter alia*) as follows, " I give and bequeath unto my Son Francis Hall, and the Heirs of his Body lawfully begotten, all my real and personal Estate to his and their own Use within three Years after my Decease; but in case my Son Francis Hall shall depart this Life, leaving no Heirs of his Body lawfully begotten living, then I give all and so much of my Estate as he shall be actually possessed of at the Time of his Death to the Corporation and Company of Goldsmiths in London, upon Trust, &c." *F. Hall* died without any Children, and this Information was brought by the Goldsmith's Company to have the Estate of *Thomas Hall*, both Real and Personal Estate, appropriated to the Charity as directed by *Thomas Hall's* Will. As to the real Estate, the Defendant, who was the Executrix of *Francis Hall's* Will, pleaded a Common Recovery which her Husband had suffered, whereby he declared the Use thereof to himself in Fee, and devised the same afterwards to her. And upon arguing this Plea, the Court allowed the same, being of Opinion, that *Francis Hall* was Tenant in Tail of the real Estate under the Will of *Thomas Hall*, and that the same was consequently barred by the Common Recovery; so that the only Question now before the Court was, whether this Limitation over to the Goldsmith's Company was a good Limitation over of the personal Estate.

Information to have both real and personal Estate appropriated to the Charity.

*Counsel pro Quer:* The only Question is, whether the Devise over to the Goldsmith's Company was a good Limitation or not? I beg Leave to consider it in two Lights. 1<sup>st</sup>, Instead of the Words (*Heirs of his Body*) the Word (*Sons*) had been mentioned; and 2<sup>dly</sup>, As it now stands with these Words (*of the Heirs of his Body*); and 1<sup>st</sup>, If the Word *Sons* had



had only been mentioned, then the Devise over to the Goldsmith's Company would have been good.

These executory Devises were formerly not known in the Law; and such Limitations over were allowed at first in Cases only of Chattels Real, as appears in *M. Manning's Case*, 8 Rep. 94. which was the first Case; afterwards *Lampet's Case* in 10 Rep. 46. was determined, where these Limitations were carried somewhat further; and since those Cases were personal, meer personal Chattels have been allowed to have been limited over. In the present Case, the Contingency, upon which the Charity is given, is to arise within the Time limited by Law, viz. upon *Francis Hall's* dying without Issue living at the Time of his Death, and not after a general dying without Issue, which would be void; the Words of the Will are, *If he shall depart this Life leaving no Heirs of his Body lawfully begotten living, then I give, &c. Heirs of the Body* must be *Heirs of his Body at the Time he shall depart this Life*; and the Words *leaving* and *living* are very significant and express, and refer to the Point of Time before, which is the Time of *Francis Hall's* Death; the Word *then* may likewise refer to the Time of *Francis Hall's* Death, and denote when the Contingency shall happen; but tho' it may be in different Cases applied to either, yet in the present Case it refers to the Time, and not to the Contingency in Question. 1 Vern. 234, 250, 298. 2 Vern. 38, 59, 766. These Cases shew how it would have been, if instead of the Words *Heirs of the Body* there had been the Word *Sons*; and if there are other Words in the Will which shew what the Testator meant by the Words *Heirs of his Body*, and that he only intended *Heirs of the Body at the Time of Francis Hall's Death*, it will come to the same Thing; and the latter Words of the Will, viz. "But in case my Son *Francis* shall depart this Life, &c." are restrictive of the Generality of the former Words, (*Heirs of his Body*). As where a Devise is to *A.* and his Heirs, so long as *B.* shall have Heirs of his Body, there, tho' *A.* by the first Words takes an absolute Fee, yet they are restrained by the subsequent Words; but the Words (*Heirs of the Body*) in this Case are only applicable to the Testator's Real Estate, which may be intailed; and not to his personal Estate, which cannot be intailed and made capable of being taken and received by Discent; but as to his Personalty, they were to vest a Property only; and then the Question will be, whether this Limitation over will be good. 2 Vern. 86, 195. Tho' there is a Real Estate devised by his Will as well as a Personal Estate, and the same Words pass both Estates, yet such a Contingency may afterwards be inserted (as in the present Case) to determine the Property as to the Personal Estate.

Counsel on the same Side: This Limitation to the Goldsmith's Company is good as an executory Devise. Executory Devises are not within the Rules prescribed by the antient Common Law, but are Evasions out of it, which the Courts of Law have allowed and come into, to answer and comply with the Intent of the Testator; and if the present Words will bring this Case within the known Rules concerning executory Devises, this Court will countenance this Limitation; and this Court has often allowed such Limitations over, to comply with the Intent of the Testator, tho' they have not been so strictly conformable to the Rules, as in the present Case. It is said there are two Contingencies in this Case, viz. *Francis Hall* dying without Issue at his Death, and also his being actually possessed, &c. for only such of the Personal Estate, as he should be possessed of at his Death, is limited over; and therefore the Limitation over is void; but I apprehend that such a Limitation may depend on a double Contingency; and so several of the Cases cited in *Vernon* prove.

*Talbot* Solicitor General *cont'*. The Limitation to the Goldsmith's Company is void, and the Information must be dismissed. By Will the Residue both of the Real and Personal Estate is devised to *Francis Hall* and the Heirs of his Body, to his and their Use. As to the Real Estate, it is an Intail executed; and as to the Personalty, which cannot be intailed, it gives an absolute Property; and the Will limits nothing over to the Goldsmith's Company, but what *Francis Hall* should be actually possessed of at the Time of his Death; so that there is Power left in him to alien and dispose of all or any Part of it; besides, there are other Words in the Will which shew that *Francis Hall* had the sole Property of the Personalty vested in him; for the Words are, "But my Will is, that the Company of Goldsmiths shall not give my Son any Trouble on any Account whatsoever concerning my Estate". So that taking it for granted, that *Francis Hall* had an Interest vested in the whole Personal Estate, (and which, if he had pleased, he might have spent every Farthing,) the single Question will be, whether this Limitation or executory Devise to the Goldsmiths Company will be good or not; and I think it is void. 2 *Vern.* 245. *Clergis* versus *Dutcheffs of Albermarle*. There the Difference is taken between Chattels Personal that are vested, and where the Use only is devised. 2 *Vern.* 600. *Higgins* versus *Dowler*; *Salk.* S. C. 156. And the Case of *Richards* versus *Lady Abergavenny* is in Point; where a House together with the Furniture thereof was limited to a Wife and such Heir of her Body as should be living at her Death, and in Default of such, Remainder over. The Wife has an Estate-  
tail



tail in the House, and an absolute Property in the Furniture. 1 *Vern.* 326, 347. *Whitmore* versus *Wild*; 2 *Vern.* 367. is a strong Case; where such a Limitation of a Personalty over was held ill, because it was an Interest vested. 1 *Vern.* 478. *Deering* versus *Hanbury*; 2 *Vern.* 110. *Webb* versus *Webb*; *Cro. Jac.* 590. *Pell* and *Brown's* Case is the Intail of an Inheritance. The Counsel for the Plaintiff does not know what Decree to pray, whether only such specifick Part of the Personal Estate which *Francis Hall* was actually possessed of at the Time of his Death, or whether there should not be a Decree that his Representatives should account for so much as he spent; to insist upon the last is repugnant to the Will, because *Francis Hall* by the Will had Power to dispose of the whole as he thought proper; and as to the other, that makes the Devise over dependant on two Contingencies, and therefore void; so that if there be a Limitation over in the present Case, (which there cannot, because an Interest and Property is actually vested;) yet as the present Case stands, it would be a void executory Devise, because it is not confined to dying without Issue at the Time of *Francis Hall's* Death. The two Words insisted upon in the Will to confine the Dying without Issue to the Time of the Death of *Francis Hall* are (*living and leaving*); but if a Man dies without Heirs of his Body, he dies without Heirs of his Body living, and if he leaves no Issue, he dies without leaving Issue; but for the Reasons aforesaid this is not material to be determined.

*King* Chancellor, *Fekyll* Master of the Rolls, and *Reynolds* Lord Chief Baron: In regard the Ownership and Property of the Personal Estate was vested in *Francis Hall*, and not the Use only; this was held to be a void Limitation to the Goldsmith's Company. It is giving a Man a Sum of Money to spend, and limiting over to another what does not happen to be spent; and therefore the Information was dismissed.

And so *Note* a Difference between a Devise of Chattels Real and Personal.

### Selby versus Selby, 5 Geo. II.

- ( 14. ) **S**Erjeant *Selby* made his Will, and appointed his Wife sole Executrix and sole Guardian of his Son, and then devised further, "That if my dear Wife shall marry again before my Son shall attain his Age of twenty-one Years, that then and from thenceforth I appoint my Brother Executor and sole Guardian of my Son". The Mother died, the Son being about thirteen Years of Age; and the Question was,

was, whether the Uncle, (who would have been Guardian in case the Wife had married again,) should now be Guardian, or the next of Kin, who could not inherit.

Whether Uncle or next of Kin should be Guardian.

*King Chancellor:* Here is no Limitation of the Guardianship to the Wife for Life. It seems to me that the Uncle must have been Executor and Guardian at the same Time; he should not have much doubted but that the Uncle would not have been, was it not for the Case cited in *Raym.* 427. and 3 *Lev.* 125. and a Case was made of it for the Opinion of the Judges of *B. R.*

### Anonymus, 5 Geo. II.

**C**OUNSEL moved to extend an Injunction to stay Proceedings against the Bail. The Plaintiff before he filed his Bill had been arrested, and Bail was given to the Sheriff. Plaintiff afterwards had obtained an Injunction upon a *Dedimus*, notwithstanding which the Defendant had taken an Assignment of the Bail-Bond, and was proceeding at Law against the Bail.

( 15. )  
Injunction to stay Proceedings against Bail.

*Lutwyche cont:* A common Injunction extends only to delay Execution, it stays nothing else, and the Plaintiff at Law may proceed to Judgment; and whenever it is extended to stay Proceedings against the Bail, it is always particularly mentioned.

*King Chancellor:* If a Declaration is delivered, the Party may proceed to Judgment notwithstanding an Injunction, and Execution is only stayed; and if no Declaration has been delivered, all Proceedings at Law are stayed; that is the Practice and Construction that has been constantly put upon the Words in the latter End of the Writ it self. Motion was granted.

### Vizod versus Londen, 5 Geo. II.

**A** Bond was entered into before Marriage by the Defendant's Husband for the Sum of 500 *l.* and the Condition recited the intended Marriage, and that the Obligor was to receive a competent Fortune, and thereupon the Obligor was to settle Lands of the yearly Value of 14 *l.* as Counsel should advise, to the Use of the Defendant for Life, for her Livelihood and Maintenance, if the Marriage should take Effect and she should survive her Husband; otherwise the Bond to stand in full Force. The Question was, if this should be a Bar of Dower. The Master of the Rolls was of Opinion it

( 16. )  
Bond before Marriage, if a Bar of Dower.



was not; but King Chancellor, being of a different Opinion, reversed his Decree.

King Chancellor: Several Estates that are not specified in the Statute 27 H. 8. c. 10. 1. b. are yet within the Equity of the Statute; and the present is not a Case within the Letter of it; but whenever an Estate is settled so as to fall and take Effect immediately upon the Death of the Husband, with a Covenant or other Instrument, declaring it to be as a Jointure or in Bar of Dower, and is tantamount to its being an actual Settlement within the Letter of the Statute. What is necessary to be done by the Words of the Statute? The Words are expressly (*for the Jointure of the Wife*), but the Statute does not say that the Jointure must be, to be expressed in Bar of Dower. The Bar of Dower is only a Consequence of its being a Jointure; and a Jointure, according to my Lord Coke, is a Provision and Maintenance for the Wife; and sure this is expressed to be so, and therefore within the Description of it. Before the Statute 29 Car. 2. of Frauds, a parol Averment of any such Provision being made as a Jointure was sufficient. Decree reversed; *vide 4 Rep. Vernon's Case. 2 Vern. 505.*

### Evelyn versus Evelyn, 5 Geo. II.

(17.)

THIS Cause came on to be heard before King Chancellor, assisted by Raymond C. J. and Jekyll Master of the Rolls, on the 26th of Oct. 1730. The Case was this: George Evelyn the Grandfather being seised of several Estates, viz. of an Estate for Life, with Remainder to his Son John in Tail, and likewise of other Lands in Fee, (all which Estates lay in the County of Surry, and were of the Value of 900*l.* per Annum, or thereabouts,) settled the same by two several Deeds, the one dated 20th of October 1698, relating to the intailed Lands, and the other dated 21st of Nov. 1698, relating to the Fee-simple Lands, to the Use of George the Grandfather for his Life, with a Power to charge the same with 6000*l.* and after his Decease to the Use of John for Life, Remainder to his first and other Sons in Tail Male, with like Remainders to the second, third and fourth Sons, &c. of George the Grandfather, with Remainder to himself in Fee; and in both these Deeds there was this Clause, viz. "That it should be lawful for George the Grandfather, together with such Son as should be next in Remainder, and after the Death of George the Grandfather, then and for every the Son and Sons as should be in Possession of the Premises,

“Premises, to make any Lease or Leases *sans* Waste, (so it be without Prejudice to any Jointure,) for raising Portions for a Daughter or Daughters of such Son or Sons, and so as such Portions do not exceed the Fortune of the Wife, and so as such Lease be not to take till Failure of Issue Male”. But there was some Difference in the Wording of the Clauses of the two Deeds; for in the Deed, by which the Fee-simple Lands were settled, it was expressed in this Manner, viz. “To make a Mortgage, or to make any Lease or Leases, so as the same be determinable upon raising such Portions, and the Costs and Charges attending the same.”

George the Grandfather had Issue five Sons, *John*, *George*, *Edward* and two others; *George* the Grandfather died in 1699. *John* his eldest Son died without Issue in 1703. *George* the second Son entered, and a Marriage being afterwards agreed to be had between him and Mrs. *Garth*, in Consideration thereof, and of his intended Wife's Portion, (which amounted to 8000 *l.*) the said *George* covenanted by Deed 22d of August 1720. to appoint certain Lands contained in the former Settlement for his Wife's Jointure of the yearly Value of 790 *l.* or thereabouts, and also devised the said Jointure Lands, and other Lands contained in the said two Deeds of Settlement, to Trustees for 500 Years, to take Effect on Failure of Issue Male by him, and subject to the Jointure; upon Trust, that if there should be Failure of Issue Male of the Body of the said *George*, begotten on his said intended Wife, and the said *George* should have one or more Daughters so begotten, that then the said Trustees and the Survivor of them, and the Executors and Administrators of such Survivor, should out of the Rents, Issues and Profits, or by Sale, Mortgage or Lease, as to them in their Discretion should seem meet, as soon as conveniently might be after the Decease of the said *George*, or in his Life, if he should think fitting, to have the said Portion or Portions sooner raised, and should so direct, to levy and raise the Sum of 8000 *l.* to be paid to such Daughters, Share and Share alike, (provided the Term shall not prejudice the Jointure). The Marriage took Effect, and *George* left Issue three Daughters, (the eldest about five Years old,) and died in the Year 1726. The Infant Daughters now brought the Bill by their Mother as *Prochein Amy*, to have their Portions raised.

Infant Daughters brought the Bill by their Mother as *Prochein Amy*. to have their Portions raised.

It happened that *George* the Grandfather had charged the Premises by Way of Mortgage for 1500 *l.* according to his Power in the Settlement (whereby he had Power to charge the same with 6000 *l.*) so that the Estate came to *George* his Son, subject to that Incumbrance; and the Mortgagee calling in his Money, the said Mortgage was assigned over to a third Person;



Person; in which Assignment *George* then covenanted to pay the Mortgage-Money. *Edward Evelyn* the third Son, and next in Remainder, brought his Bill against the Assignee of the Mortgagee, and the Administratrix of *George* the Son, to have the Real Estate discharged, and that the Mortgage might be satisfied out of the Personal Estate of *George* his Brother; but as to this Matter his Bill was dismissed.

Mr. *Lutwyche* and two others, Counsel with the Plaintiffs in the original Cause, argued, that altho' it would very much hurt *Edward* the next in Remainder, that the Portions should be raised immediately, yet the Court must regard only the Construction of the Settlement under which all Parties claim; and if it was the Meaning of *George* the Grandfather to preserve the Estate in the Issue Male of the Family, yet it was subject to the Charges in the Settlement; and for this Reason, because without Marriage there must be Failure of Issue Male; and the present Inconveniency arises only from too large a Portion, which the Jointress brought into the Family; the Power in the Settlement made in 168c. was to make Lease or Leases at a Pepper-Corn Rent, to raise Portions for Daughters upon Failure of Issue Male, and so as not to prejudice the Jointure; and since the Person who had such Power had executed it, for that Purpose it was vested *instantly*, and became immediately due; for when it is said such Power to make Leases shall not be but upon Failure of Issue Male, the Party may do it, and that the Interest shall be then vested; and so if a Portion be appointed to be paid out of Lands at twenty-one, it implies it shall not be paid before that Time; but when there is no Time of Payment limited, it is left to the Discretion of the Party to whom the Power is given to appoint the Time of Payment as he pleases; if the Portions are not to be raised now, at what Time shall they be raised? or is Part of the Portions to be raised now upon the Lands in Possession, and Part to wait the Death of the Jointress? This would be to construe the Words of the Settlement contrary to the natural Import and Construction of them. For the Clause which gives a Power to raise Portions is single and intire; the Daughters have now a present Occasion for their Portions, for there is no further Provision made for their Maintenance in the *Interim*; and if the Portions are not now to be raised, it may become a Question if they shall not sink in the Lands, should the Infants die before they are raised; and so the Portions may be intirely lost; and from the Nature of Portions, which are considered as Sums in Gross, it appears they ought to be paid in intire Sums, and not by Parcels out of the Rents and Profits; for the raising Portions in such a Manner would be like paying an uncertain Annuity, which would be more in one Year than

than another, or Part or the Whole thereof must be spent in Maintenance; whereas Portions are intended for the Advancement, and to be a lasting Provision for them, and to furnish a Maintenance from the Interest thereof. Neither is it an Objection to say, that the Portions in the present Case are restrained to be raised by way of Sale, and directed only to be raised by Lease and Leases; for a Man, that has a Power to make a Lease, may make a Lease absolute or conditional; also he may take a Fine upon such a Lease, and is in the Nature of a Sale; neither can it be objected that the Portions are not to be raised by a Sale; because by the Words of the Settlement it is said, "So as such Lease or Leases be determinable upon raising such Portions and the Costs attending thereon"; for a Proviso or a Restraint repugnant to the Thing granted is null and void; it must be intended to be meant, that the Lands comprised in the Settlement, and not leased, shall be wholly discharged. Besides, if a Man lends 8000 l. upon such a Security, it cannot be said that the Lands have raised, or that it has been paid out of them, until the Principal, Interest and Costs are paid. The Person indeed has lent his Money, but not without Regard to Interest, and until the End and Purpose of the Security is served, surely it shall not be construed to be discharged. *Kilmurray versus Green in Canc.* 1713. Neither is it strange reversionary Terms should be sold to raise the Daughters Portions; it has been frequently done. *Jones* 201. 2 *Vern.* 458. *Gerrard versus Gerrard.* 2 *Vern.* 460. *Stanisforth versus Stanisforth*, which is a Case almost in Point; and 2 *Vern.* 72. *Earl of Rivers versus Earl of Derby.* That it was not to be disputed, but that George the Son had well executed the Power by the Deed of August 1720. and thereby directed, "That upon Failure of Issue Male, the Portions should be raised as soon as conveniently they might be; which imports they should be raised as soon after his Death as possibly might; the Father certainly intended the Benefit of his Daughters; and whose Conveniency could he be supposed to regard, that of his own Children, or the Persons in Remainder, to whom it might never be convenient to pay their Portions? besides, the Father has provided no other Support or Maintenance for his Daughters.

As to the Demand of 1500 l. by the Defendant's Cross-Bill, it was said to be a meer Fancy; that altho' George the Son had covenanted with the Assignee of the Mortgagee to pay the Money, such Assignee could only have the Benefit of the Covenant; for that the Land in this Case was the principal Debtor; and George the Son gave his Covenant only by way of collateral Security. And the Counsel compared it to



the Case of a principal Debtor; and surely altho' both are liable at Law, yet a Court of Equity will lay the Burden where it ought to be born; and if the Surety is compelled at Law to pay the Debt, this Court will order the Repayment from the Principal. 1 *Leo. Jenkins* versus *Keymis*, 150.

Counsel argued *pro Def.* That to raise the Portions by Sale of Part of the Estate during the Life of the Jointress, would be spoiling the whole Estate and rendring it of little Value; and that it never could be the Meaning of George the Grandfather, who made the Settlement 1680. in View and Favour of the Heirs Male of the Family, to design the Portions for Daughters should be raised by Sale of a reversionary Term, and thereby defeat his principal Intent to preserve his Estate in his Heirs Male; and the Intent of the first Grantor ought to be considered in the Construction of his Deed, and which was made of no other Consideration but to preserve his Estate and Family. That his Intent appears plainly from the Restraints laid upon the Power, that the Portions must be raised out of the Rents and Profits only; for it is directed to be done by Lease only, and that to be determined upon raising such Portions. If it was to be raised by a Sum in gross, the Security is declared to be determined as soon as such Portion is raised; and that it is one Thing to lease, and another to mortgage and sell; which is not provided by the Settlement. If Lands are extended upon a Judgment by *Elegit*, the Party shall hold them only till the Debt is satisfied out of the Rents and Profits, and shall not hold them afterwards in respect of any Interest to rise by that Judgment. The Plaintiffs are of tender Years, and have no Occasion for their Portions which are given for Advancement; and the Court will after determine what is a convenient Time for the doing of a Thing where no Time is appointed by the Parties. 2 *Vern.* 439. *Bruen* versus *Bruen*. 2 *Vern.* 208. *Norfolk* versus *Gifford*.

As to the Demand of 1500*l.* it was said, that this Court would always direct the Personal Estate to come in Aid of the Real Estate, either in Respect of an *Heres natus* or an *Heres factus*; that there was nothing to distinguish the present Case from the Case of Sir John Nappier and Lady Esfingham; vide *House of Lords Cases*.

But it was answered, that the Case of Sir John Nappier was nothing to the Purpose; for that Edward, who has brought the Cross-Bill, is neither an *Heres natus* or *factus*, for that he claimed nothing under George the Son, but under the Settlement which was made in 1680. The Court took Time to advise, and directed the several Precedents to be laid before them.

Sheriff *versus* Morlock, Dec. 2. 1731.  
5 Geo. II.

*At the Rolls.*

THE Testator by his Will devised a Legacy of 500*l.* to his Niece out of certain Lands, Proviso if she should not marry in the Life-time of his Wife, or if she should marry in the Life of his Wife without her Consent, then the Legacy of 500*l.* was to sink into the Estate of the Devisee. The Niece married in the Life-time of the Wife, not only without her Consent but directly contrary to it; and the Question was, whether this 500*l.* was forfeited.

( 18. )

Legacy with  
Proviso not  
to marry.

Counsel *pro Quer*: Conditions of this Kind are void by the Civil Law, because they are in Restriction of Marriage, which is for Publick Good; and there are many Cases in *Swinbourne* to that Purpose; but by this Court they are not totally void; for where there is no Limitation over, such Condition is only *in terrorem*, and the Legacy is not forfeited. But where there is a Limitation over, it is otherwise, and a Forfeiture. But he said, there was a Difference between a Limitation over to a particular Person a Stranger, and when it is directed to sink into the *Residuum* of the Estate; and in the last it is esteemed *in terrorem* only, and occasions no Forfeiture, tho' such Consent is not obtained; and to prove this Distinction he cited 2 *Vern.* 293. *Garrett versus Pritty*.

Counsel on the same Side cited the Case of *Pamtori versus Berry*, before the Master of the Rolls; which was a Legacy devised to a Person, provided she married with the Consent of *A.* and *B.* and if she married without such Consent, Limitation over to another. *B.* died before the Marriage, after the Legatee married without the Consent of *A.* and there held she should have the Portion notwithstanding the Limitation over. To which the Court answered, the Consent of *A.* and *B.* was jointly made necessary; and by the Death of *B.* that becoming impossible by the Act of God, the Condition was therefore intirely dispensed with.

Solicitor General *cont*: All the Cases cited are only as to personal Legacies; but this differs, because it is a Condition annexed to a real Estate, and the Consent is a Condition precedent, to be performed before the Party can be intitled. And when there is such a Charge upon a real Estate, the Distinction of a Limitation over and not, and the Difference also of its being limited to a particular Person, or being to sink into



into the Surplus, fails. This therefore being a Charge upon the Lands, and the obtaining Consent, being a precedent Condition not performed, the Legacy becomes forfeited. And the Master of the Rolls, being of this Opinion, dismissed the Bill. *Vide ante.*

*Note;* There seems to be a Difference between Conditions precedent as to personal Legacies, and Conditions precedent as to such Charges on Land. *Vide* as to such Conditions annexed to real Estates, 1 *Mod.* 300. *Fry versus Porter*, 2 *Vern.* 333. & *vide* 1 *Roll. Abr.* 418. A Lease for Life upon Condition, that if the Lessee marry without Licence the Lessor may re-enter; and this was held a good Limitation.

### *Ex parte* Riley, 5 Geo. II.

( 19. )  
Mutual  
Debts set  
against each  
other in a  
Commission  
of Bank-  
ruptcy.

THE Petitioner was indebted to *Woodward* a Banker upon Account of Cash-Notes that he had accommodated him with, and whilst he was so indebted *Woodward* became a Bankrupt, and the Assignees under the Commission against *Woodward* had brought an Action against *Riley* for the Money; it happened that *Riley*, against whom the Action was brought, and one *Chapman*, who were joint Partners, were Creditors of the Bankrupt *Woodward* on other Accounts, more than *Riley* on his own separate Account really owed to *Woodward*; therefore *Riley* insisted, as there was a mutual Credit between him and the Bankrupt, one Debt should be set against the other; and that it would be hard, that Assignees under the Commission should recover the whole against him, and he and his Partner come in only under the Commission proportionably for what *Woodward* owed them with other Creditors. It was insisted for the Petitioner, that altho' the 5 *Geo.* 1. as to mutual Credit was expired, yet this Case was within the Equity of the Statute 2 *Geo.* 2. for Relief of Insolvent Debtors, whereby mutual Debts are to be set one against the other, upon Notice given, &c. and that it had lately been determined in a Case where *Woodward's* Assignees were Parties, that a Debtor of *Woodward's*, tho' a Creditor in other Respects, should have one Debt set against the other upon the Foot of mutual Credit by the Commissioners.

It was said on the other Side, that joint Debts cannot be set against a separate Demand due to the Bankrupt.

*King* Chancellor was of Opinion, that this Case was not within the Meaning of the Statute 2 *Geo.* 2. of one Debt being joint and the other separate; but if *Woodward* had been indebted to *Riley* singly, he thought that was a mutual Credit

dit within the Statute. And tho' in such Case the Statute speaks only of setting one Debt against another upon Trials, yet Commissioners of Bankruptcy are within the Equity of the Statute, and may allow of mutual Debts being given in Discharge upon the Demand of Assignees.

Dux Chandois *ver.* Talbott, 5 Geo. II.

**T**HIS was a special Matter for the Judgment of the Court upon the Master's Report, and the Question was, ( 20. ) if a Sum is devised to A. to be paid him at twenty-one, and the Testator charges his real and personal Estate with the Payment thereof, and the personal Estate falls short, and A. dies before twenty-one Years of Age, whether in such Case the Legacy is lapsed and merged for the Benefit of the Heir at Law.

Solicitor General took the Difference between a Legacy given at twenty-one, and payable at twenty-one; with respect to a personal Legacy, when it is given to be paid at twenty-one, then it is a vested Interest; and the Courts of Equity have with Regard to personal Estates followed the Rules of the Ecclesiastical Court in that Particular: But with respect to real Estates it is otherwise; and if in such Case the Legatee dies before he is twenty-one, it is a lapsed Legacy, and shall sink into the Land and be merged for the Benefit of the Heir at Law; but in the Case of a Legacy meerly personal, it would go to his Representatives. And of this Opinion was King Chancellor, and ordered accordingly. *Vide 2 Vern. 92, 248, 416, 457. 2 Vern. 72. 2 Vern. Pawlett versus Doggett, 86. Dy. 59. c. 15. b. 2 Salk. 415.* Legacy, whether lapsed and merged.

Penderil *versus* Penderil, 5 Geo. II.

**T**HIS Cause stood in the Paper for Hearing, and the Plaintiff applied to King Chancellor by Petition, that a Deposition taken in the Cause might be amended upon an Affidavit of the Witness; the Examiner had mistaken him in the following Manner: "The Witness had been examined when he saw such a Person;" and it was taken down in the Deposition, "About six Weeks after the Marriage of the Man inquired after;" whereas the Witness in his Affidavit swore that he said, "About six Weeks after the Fire which happened in Drury-lane about August 1727." ( 21. ) Petition that a Deposition in the Cause might be amended.

H

King



King Chancellor, upon hearing the Depositions and Affidavits of the Witnesses, ordered the Witness who was present in Court to be sworn, which was done, and the Man examined, and, the Examiner attending, his Deposition was amended instantly, and the Cause proceeded.

But the like Application being made between the Seals in a Cause between *Traherne* and *Burdus*, he denied it, and said this Matter must be stopt in Time.

### Mortimer *versus* Mortimer, Pasch. 5 Geo. II.

( 22. )  
Devise with  
Limitations.

**H**ENRY Smith by his Will devised all his Lands, Tenements and Hereditaments whatsoever, whereof he was seised and possessed of, to Trustees for 1000 Years, in Trust to permit and suffer *James* his Son and his Issue to enjoy the Lands, and to receive the Profits during the said Term; but if his Son should die leaving no Issue extant or ensient, then to permit and suffer his Daughter *Anne* and her Issue to enjoy the Lands, and to receive the Profits during the Term; and if his said Daughter *Anne* die, leaving no Issue extant or ensient, then to *Michael Smith* his Cousin, *ut supra*. *James* survived *Henry*, and died leaving no Issue, and appointed his Wife Executrix. *Anne* the Sister of *James*, and Daughter of the Testator, died in the Life-time of her Brother *James*, leaving Issue *Anne Mortimer* the Plaintiff; the Father of *Anne Mortimer* took out Administration of the Goods and Chattels of his Wife *Anne* deceased.

Whether  
Leasehold  
Lands pass  
by this De-  
vise, or only  
his Freehold  
Estate, &c.

In arguing this Case three Points arose, 1<sup>st</sup>, Whether the Leasehold-Lands of the Testator passed by his Devise, or only his Freehold Estate. 2<sup>dly</sup>, The Limitation to *Anne* the Daughter, in the Manner it is limited, is a good Limitation or not? and 3<sup>dly</sup>, Whether the Administrator of *Anne* the Daughter of the Testator, or *Anne* the Daughter and Issue of *Anne*, shall be intitled to the Term.

Counsel, as to the first Point, objected, that by a Devise of all Lands, &c. generally the Freehold Lands only, and not the Leasehold Lands of the Devisor, will pass. *Cro. Car.* 293. But in case the Testator had no Freehold Lands, the Leasehold Lands will then pass. 2 *Dano. Abr.* 527. In this Case the Testator appears to have both Freehold and Leasehold Lands. The Testator was possessed of a Term for ninety-nine Years, determinable on the Death of a third Person, which he never had in his Intention to pass. If a Man seised of Freehold Lands, and possessed of a Term, grants a Rent-charge, the

Rent is issuing out of the Freehold Estate only. 1 *Inst.* Indeed the Leasehold Lands are liable to a Distress. As to what is said, that the Word *seised* passes as to the Premises that are Freehold, and the Word (*possessed*) the Leasehold. It is not in the Disjunctive *seised (or) possessed*, but in the Copulative, (*and possessed*); and a Man, if the Strictness of the Words are to be regarded, is *seised and possessed* of Freehold Lands if he is in Possession. The Term of 1000 Years, limited by his Will to the Trustees, is created out of the Reversion in Fee the Testator had expectant on an Estate-tail.

King Chancellor: This is a Devise of all the Testator's Freehold and Leasehold Lands; it appears by the Proofs in the Cause, that the Testator had only one House which was Freehold, and he takes Notice in his Will, that the House was only Part of the Premises devised; he must therefore intend to pass his other Lands which are Leasehold. 2dly, The Limitation over to *Anne* the Testator's Daughter is also good; for this is not a Limitation of a Term, after a general Dying without Issue, which would be undoubtedly bad, but after a particular Dying without Issue, by reason of the Words (*extant and ensient*; *extant* implies without Issue at the Time of his Death, *ensient* is applicable to his Wife's being with Child at the Time of his Death. A Devise to an Infant *in Ventre sa mere* is a good executory Devise. *Salk.* 230. This therefore is a good executory Devise to *Anne*, tho' it would have been void as a Remainder. *Vide ante.*

3dly, Notwithstanding *Anne* died in *James* her Brother's Life-time, yet this Term shall now go to her Representative, and not to her Issue. *James* had the whole Term in him whilst he lived, subject to a Contingency.

## Papillion versus Voice, At the Rolls, July 15. 1728. 2 Geo. II.

(Reheard *Hill* 5 Geo. II. *Vide post.* 34.)

THE Case was as follows: *Samuel Papillion*, being possessed of a considerable Personal Estate, by his Will *Oct.* 7. 1725. devised a Moiety of his Personal Estate to his Son the Plaintiff, and the other Moiety to the Defendant *Voice* and others, in Trust, that as soon as conveniently might be after his Death, to lay it out in Lands and to convey and settle the same, to the Use of the Plaintiff *John Papillion* for Life, *sans Waste*; and from and after the Determination of that Estate, to the Use and Behoof of the Trustees, during the

(23.)  
Personal E-  
state devised  
in Moieties.



the Life of *John Papillion*, to preserve contingent Remainders from being barred; and from and after the Decease of his said Son, to the Use of the Heirs of the Body of his said Son *John Papillion* lawfully to be begotten; and in Default of such Issue, to the Use of the Children of the Testator's late three Sisters, *Phabe Smith*, *Mary Pell*, and *Anne Gledhil*, as Tenants-in Common, and the Heirs of their Bodies, (each of the said Testator's three Sisters Children to have an equal third Part,) and for Default of such Issue, to the Testator's own right Heirs.

And after, by the Testator's said Will, he devised to the Defendant *Voyce* and others, all that his Manor of *Great Bentley* and other Lands, to the Use of his said Son *John Papillion* for Life, *sans Waste*; and from and after the Determination of that Estate, to the Use of the Defendant *Voyce* and two others and their Heirs, during the Plaintiff's Life, to preserve contingent Remainders; and from and after the Plaintiff's Decease, to the Use of the Heirs of the Body of the Plaintiff; and in Default of such Issue, to the Use of the Children of the Testator's three Sisters, *P. S. M. P.* and *A. G.* deceased, and to the Heirs of their Bodies, as Tenants in Common, (each of his three Sisters Children to have an equal Part,) and in Default of such Issue, then to his own right Heirs; and after directs, that the Plaintiff, in case he married, should have a Power to make a Jointure, as well of the Lands to be purchased as of the Lands devised, proportionably to the Portion he should receive; and if he married with Consent of Trustees, that then he might make any Settlement whatsoever. The Testator made the Defendant *Voyce* and the other Trustees his Executors, and died; each of the Testator's Sisters left several Children, Defendants in the Cause; and the End of the Plaintiff's Bill was to have the Moiety of the Personal Estate devised to the Trustees either paid to him, or laid out in Lands to be settled on the Plaintiff in Tail.

Solicitor General and Mr. *Lutwyche pro Quer*. That the Uses of the Lands to be purchased, being the same as the Uses limited of the Manor of *Great Bentley* devised by the Will, and which is an Estate-tail executed in the Plaintiff, the Court ought therefore to direct the Uses of the Lands to be purchased to be limited accordingly. They agreed, was this the Case of executory Marriage-Articles, it would be otherwise; and the Court in directing the Form of the Conveyance, instead of being limited to the Heirs of the Body of the Plaintiff, would direct the Limitation to be, to the first and other Sons, &c. because such Articles are made upon a Consideration; and the Court will therefore in such Case take Care of the Issue, and not put it in the Power of the Father

to bar them, and therefore will not direct such a Settlement to be made as the Father may defeat the next Day.

But in the Case of a Will all is voluntary, and there this Court will not help further than the Law does. The Words in a Will must have their legal Operation, and the Court must take them as they find them; and for this Distinction between Articles and a Will was cited 2 Vern. 670. *Baile versus Coleman*, 2 Vern. 702. 2 Vern. 551. *Legatt versus Sawill*; and *vide ibid.*

When Money is devised to be invested in Lands and settled in Tail, how far the Party, on whom such Settlement in Tail is to be made, can demand the Money before any Settlement. The next and chief Point was, whether, in case the Lands were purchased and settled as the Will directs, the Plaintiff would be immediate Tenant in Tail or for Life only? And as to that, the same Uses being limited as to the Lands to be purchased, as are of the Lands actually devised, all falls under one Consideration; and as the Plaintiff is Tenant in Tail by the Will of the Lands devised, consequently he will be so of the Lands to be purchased, and that notwithstanding the express Estate given to him for Life. And they relied on the Rule laid down in *Shelley's Case*, 1 Rep. 104. a. viz. *That whenever an Estate of Freehold is limited to one, and after by the same Gift and Conveyance an Estate is limited either mediately or immediately to his Heirs in Fee or in Tail, viz. To his Heirs or the Heirs of his Body; the Heirs cannot make themselves Purchasers, but must take by Descent, and this, tho' ever so many particular Estates be limited between; which comes exactly to the present Case; for John Papillion has in the first Instance an Estate of Freehold for Life, and then, notwithstanding the intermediate Estate to Trustees, the Words (Heirs of his Body) must be Words of Limitation; this Rule has never been denied to be Law; if therefore, upon Construction of all the Uses, the Court should be of Opinion that the Plaintiff takes an Estate-tail, then the Court will decree a direct Limitation to the Plaintiff in Tail, and not direct a Conveyance contrary to the Words of the Will; and to this last Thing his Honour agreed; saying, it was the Office of this Court to quiet, and not create Disputes.*

A. G. and others, Counsel for the Defendants, said little or nothing as to the first Point; but argued chiefly, that by the Limitation in the Will the Plaintiff had only an Estate for Life in the Lands devised, and would have no more in the Lands to be purchased; did not deny the Rule in *Shelley's Case*, but said that Rule goes only to Limitations by Deeds; and that a greater Latitude is allowed in Constructions in Wills; for the same Words shall have one Construction in a Deed and another in



a Will; as a Devise to *A.* for ever is a Fee in a Will; but only an Estate for Life in a Deed, for want of the Word *Heirs*. So a Devise to *J. S.* and his Issue in Tail, is an Intail in a Will; but otherwise in a Deed: So to *J. N.* and his Heirs Male, is an Intail in a Will; *aliter* in a Deed.

And here are many Circumstances in this Will to shew the Testator only intended the Plaintiff should take an Estate for Life. As the Clause without Impeachment of Waste. The Limitation to the Trustees to perform contingent Remainders will be nugatory, if the Limitation to the Heirs of the Body of the Plaintiff are not construed contingent Remainders; (and had this Clause been in the Case of the *King versus Mel-ling*, that would have been adjudged an Estate for Life;) and also the Power to make a Jointure. All these Particulars, besides the express Estate for Life, demonstrate what was meant by the Words (*Heirs of his Body*). *Vide 2 Salk. 679. Broughton versus Langley. 1 Lutw. 823. S. C. 1 Salk. 224.*

*Jekyll M. R.* This is a Case of great Consequence and Difficulty; and would take Time to consider of it. But to break the Case, as to Consideration of the Limitation of the Personal Estate. In the Case of *Bail versus Coleman*, Lord Chancellor *Cowper* held, that the Trustees should execute as in case of Articles; but Lord *Harcourt* afterwards held the contrary, and with good Reason. *2 Vern. 536. Sweetapple versus Bindon*; there the Difference also which has been taken between a voluntary Devise and Marriage-Articles is agreed. The Rule of Construction of Wills must be governed by the Intent of the Party, consistent with the Rules of Law, *i. e.* the Rule of Law that has been received in Construction of Wills, and not of Deeds; for there are many Differences that have been adjudged between them according to the Cases cited. The Limitation of the Money in this Case to be invested in Land, must ensue the Construction of the Devise of the Lands; but it is too general to lay it down, that it must be in the same Words.

As to the main Point, I would see if there were any Cases where an Estate is devised for Life, with Remainder in the same Will to the Heirs of the Body of the Devisee; with Circumstances shewing the Testator intended only an Estate for Life; that the Heirs of the Body have taken by Purchase. As to the Case of *Peacock and Spooner*, *2 Vern. 43, 195.* which was cited to shew, that the Words *Heirs of the Body*, were held Words of Purchase, was dissatisfied with that Resolution, and said, that stood on its own Bottom; and that Terms for Years was not within *11 Hen. 7. c. 10.* and that *Webb and Webb*, *2 Vern. 668.* was cited by the Counsel as resolved contrary: He stated the Case of *Peacock and Spooner*; and it was a

Term for Years settled by the Husband; and being a Settlement *ex provisione viri*, was within the Reason, and therefore within the Equity of 11 H. 7. against Discontinuances of Wills: But it seems a great Stretch to extend by Equity an Act of Parliament made in a particular Case touching Lands, to Terms for Years. *Note*; This Circumstance in the Case of *Peacock and Spooner*, viz. Of the Term being settled by the Husband, and which was the Reason that governed the Resolution, is not reported in *Vernon*, nor the Statute of H. 7. mentioned, which seems a great Omission. That of *Webb and Webb*, which was resolved contrary, was also a Case of the Right of the Husband, and not of the Wife.

Afterwards the *Master of the Rolls*, viz. on the 11th of December 1728. after very great Consideration, delivered his Opinion to the following Effect:

He made two general Questions, 1<sup>st</sup>, Whether the Words (*Heirs of the Body*) in this Case were Words of Limitation or Purchase. 2<sup>dly</sup>, How far the Court, in directing the Uses of the Settlement, was bound to follow the Words of the Will?

As to the first, they are Words of Purchase in the present Case; if they are to be taken as Words of Limitation, they denote only the Quality of the Estate; but if Words of Purchase, then they denote a contingent Remainder; to the first Son of the Plaintiff which is agreeable to the Words of the Will. The great Objection is the Rule in *Shelley's Case*, 1 Rep. 104. That if the Eldest should take by Purchase, that might prevent all the other Sons from taking an Estate-tail in Succession, contrary to the Testator's Intention.

This was denied by Lord *Macclesfield* in *Trevor and Trevor*, Trin. 1719. and 1 Inst. 26. b. is a direct Authority against it. I hold, that in the Case of Wills the Intention of the Party is principally to govern. 8 Rep. 95. b. *Salk.* 237. *Countess of Bridgewater's Case*; this Rule of the Intent of the Testator being to govern in Wills is universal, and will prevail over all particular Rules. I agree, his Intention must conform to the Rules of Law, *Hob.* 32. *Cowden versus Clarke*; and therefore we are to steer between two Rules. *Hob.* 32.

All the Cases, where the Rule of Law over-rules the Intention of the Party, are reducible to four Instances. 1<sup>st</sup>, Where the Devise would make a Perpetuity. 2<sup>dly</sup>, Where it would put the Freehold in Abeyance. 3<sup>dly</sup>, Where Chattels are limited as Inheritances. And 4<sup>thly</sup>, Where a Fee is limited upon a Fee.

But the Judges have favoured the two last Kinds, and have made Limitations of Chattels good for Lives in Being, tho' never so many; and helping the other by inventing executory Devises; a Motion not mentioned in the Old Books. 3 Rep. 19. *Boraston's Case*. But



But this Rule, that the Testator's Intent is to govern in Wills, is to be laid down with this Caution, *viz.* That the Intent must be clear and apparent. 6 Rep. 1, 6. *b. Wild's Case*; and there is no Instance where this has been contradicted. Consider the Cases which have been insisted on for the Plaintiff, and which seem contrary to this Rule. The Case of the *King and Melling*; and *Hale's* Opinion, who founded himself on the supposed Intention of the Testator. 1 Ventr. 214, 225. and *vide* the Opinion of *Raymond C. J.* in the Case of *Shaw and Weigh*, with his Observations of the Case of *King and Melling*; but had there been in that Case, as there is in the present, a Limitation to Trustees to preserve contingent Remainders, *Hale* would never have said, that the express Estate for Life, with all other the Circumstances of the Case shewing the Intention of the Testator, was ballanc'd by an apparent Intent which weighed as much on the other Side, (*& mea equidem sententiâ*) that of *Hale's* is a very absurd Opinion, to make such a collective Intent, *viz.* (that as long as *Bernard* should have Children, the Estate should never go over to *John*;) controul a plain and express Intent before, and about which there would be no Doubt.

The next is *Goodright and Wright, Hill.* 3 Geo. 1. and *Goodright and Pullen, Mich.* 13 Geo. 1. Consider the Reason of the Rule in *Shelley's Case*, that where the Ancestor takes an Estate for Life, his Heir cannot be a Purchaser. I apprehend the Reason to be, (tho' it is not mentioned in any Book,) that the Law concerning Fines of Inheritance in the Ancestor, to prevent the Freehold's being in Abeyance and to avoid Discontinuances, and to prevent which the Limitation to the Trustees for preserving the contingent Remainders has been invented of late Years. Q. the Authorities to support this Opinion.

*Cro. El.* 313. *Clerk versus Day*; where Heirs of the Body were adjudged Words of Purchase. (Note; This Case is not rightly reported in any of the Books, and for the true Account of it, *vide* the Opinion of *Raymond C. J.* in the Case of *Shaw and Weigh*.) The Word *Heir* in a Will is to be taken either as a Word of Limitation & *nomen collectivum*, or as a Word of Purchase & *nomen singulare*. 1 Rep. 63. *Archer's Case*. 3 Lev. 431. *Loddington versus Kyme*. Mich. 12 Anne, Cases in Law and Equity 181. *Backhouse and Wells*; and stated per *Raymond C. J.* in his Argument of *Shaw and Weigh*. In these last Cases it has been adjudged, that the Ancestor took only an Estate for Life; but it has been objected, that in all those Cases the Limitation is to the Issue. To this it is answered, that this is no Objection, since the Case of *King and Melling*, 1 Ventr. 231.

But a stronger Case yet is the Case of *Lisle and Gray*, 2 Lev. 223. 2 Jones 114. Where Heirs of the Body in a Deed took by Purchase; and that Case was affirmed in *Cam' Scacc'*, Nov. 26. 30 Car. 2. vide *Pollexfen*; that goes far beyond the present Case. The Limitation to Trustees to preserve contingent Remainders is very strong, to shew the Intent of the Testator; as if he had said, that the Heirs of the Body of the Plaintiff his Son should take by way of Remainder.

As to the second Point, viz. How the Court ought to direct the Settlement to be made of the Lands to be purchased; he held it ought to be a strict Settlement. The Plaintiff's Counsel would not have it in the very Words of the Will; because then there must be a Limitation to the Trustees to preserve contingent Remainders. What an odd Thing would it be, for this Court to direct such a Settlement which would certainly create a Suit; whereas the Decree of this Court ought to be clear and certain. Differences have been made in this Court, as to directing Conveyances upon Wills; the first Case as to this Matter is 2 Vern. 526. *Leonard versus Earl of Sussex*.

And there decreed, that an Estate for Life should only be conveyed; and that is agreeable to the present Case. And this Settlement to be made in the present Case being only executory, and the Intent appearing clear and plain, the Plaintiff ought only to have an Estate for Life. 2 Vern. 551. *Legatt and Sewell* is also material to this Point. Agreed this Case differs from the Case of *Leonard* and *The Earl of Sussex* *primâ facie*; but the Intent there is not so certain. Pasch. 1707. Sir *John Hobart* and *The Countess of Stanford*. Upon Sir *John Maynard's* Will the Decree was, that the Money should be laid out according to the Will and Act of Parliament. And upon Exceptions to the Master's Report the Question was, whether the Settlement should be made in the Words of the Will? Lord *Cowper* declared, that in Matters executory in Articles and Wills, where Words are informal, the Court will not follow the Words but the Intent; and in that Case, the Words being very plain to preserve the Estate in a strict Manner, accordingly a strict Settlement was decreed, with Limitation to Trustees to preserve contingent Remainders; and confirmed afterwards upon Appeal to the House of Lords. The Limitations in that Will plainly tending to a Perpetuity, and the Court went as far as possible; which shews how far the Court favoured the Intent.

The next Case is *Baile and Coleman*, 2 Vern. 607. Pasch. 1711. Lord *Cowper's* Decree was reversed by Lord *Harcourt*, and upon good Grounds; and upon the Difference taken between Articles and Wills; for in Wills, the first Taker is not



to be made Tenant for Life only, without it is the apparent Intent of the Testator.

As suppose a Devise to Trustees to convey to *A.* and the Heirs of his Body, with Remainders over; the Intent does not appear that the Testator designed a strict Settlement.

The next is the Case of *Humberston* and *Humberston*, 2 *Vern.* 737. there decreed a strict Settlement; for the Reasons before mentioned. He held the Devise of the Manor of *Great Bentley* was only for Life; and therefore decreed, that the Writings of the Real Estate should be brought into Court, and the Lands to be purchased should be conveyed in a strict Settlement.

Appeal  
brought *Hill.*  
3 *Geo.* 2.

An Appeal was brought from this Decree *Hill.* 5 *Geo.* 2. before *King* Chancellor, and a Supplemental Bill came on also at the same Time, whereby the Plaintiff set forth, that since the former Decree he had discovered Marriage-Articles made on his Father's the Testator's Marriage, whereby he covenanted to settle the Manor of *Great Bentley*, and other Lands in the Will, to the Use of himself for Life, Remainder to his Wife for Life, Remainder to the Heirs of his Body; so that the Devise of the Real Estate was out of the Question. The Decree therefore was varied as to the Manor of *Great Bentley*, &c. but upon the Construction of the Will, my Lord Chancellor was of the same Opinion with the Master of the Rolls; and affirmed the Decree for a strict Settlement.

*Note;* In the Case of *Williams* and *Brown*, *Pasch.* 7 *Geo.* 2. — *C. J.* in citing this Case said, that *King* Chancellor was clear upon the Appeal, as to the Manor of *Great Bentley*, that the Devisee took an Estate-tail executed.

## Attorney General *versus* Hickman, 5 Geo. II.

( 24. )  
Information  
for Performance of a  
Charity.

THIS was an Information exhibited by the Attorney General for the Performance of a Charity, given by a Codicil annexed to the Testator's Will, by which he devised, that what should remain, and be the Residue of his Estate and Effects, be given for encouraging such Non-conforming Ministers as preach God's Word in Places where the People are not able to allow them sufficient and suitable Maintenance; and for the encouraging such as are designed to labour in God's Vineyard as Dissenters; and appointed two Persons to have the Disposal and Appointment of the said Charity, both which Persons died in the Life-time of the Testator.

Two Questions arose, 1<sup>st</sup>, Whether both the Trustees, to whom the Disposal and Appointment of the said Charity was given, dying in the Life-time of the Testator, this Charity was not gone, and in the Nature of a lapsed Legacy?

Trustees dying in the Life-time of the Testator whether a lapsed Legacy.

But *per King Chancellor*: The Substance of the Charity remains notwithstanding the Death of the Trustees before the Testator; and tho' at Law it is a lapsed Legacy, yet in Equity it is subsisting, and here is a sufficient Certainty of the Testator's Intentions to revive it; the Intention of the Party therefore is sufficiently manifest that this Charity should continue within 43 *Eliz. c. 4.* It has been held, that if the Tenant in Tail devise a Charity, tho' no Recovery is suffered, yet that it shall take place and be effectual as an Appointment under 43 *Eliz. 2 Vern. 453. Attorney General versus Rye & al. 2 Vern. 755. Attorney General versus Burdett & al.*

The second Point, Whether this be a superstitious Use within the Statute 1 *Edw. 6. c. 14.* Non-conforming Ministers and Dissenters being such general Words, as that they comprehend any Persons however opposite to the Church of *England.*

*King Chancellor*: This cannot be a Superstitious Use within that Statute; but the Dissenters here meant are Protestant Dissenters acting under the Toleration-Act, 1 *W. & M. c. 18.* and decreed the *Residuum* to be disposed of *in presenti*, and not in a perpetual Charity; and ordered a Scheme to be laid before him for that Purpose.

## Pratt versus Pratt, at the Rolls, May II. 1732. 5 Geo. II.

**P**RATT C. J. being seised of a Copyhold Estate of the Nature and Tenure of Borough *English* Lands, surrendered the same to the Use of himself for Life, Remainder to his Wife for Life, Remainder to his own right Heirs, and died leaving several Sons and Daughters; and upon hearing this Cause, touching the Distribution of the Personal Estate, two Questions arose, 1<sup>st</sup>, Whether the youngest Son, to whom these Lands descended, should bring this into Hotchpot, within the Statute 22 & 23 *Car. 2. c. 10.* or come within the Exception of an Heir at Law?

( 25. )  
Distribution of Copyhold Estate of the Nature and Tenure of Borough *English* Lands.

2<sup>dy</sup>, Whether this Estate, with respect to such younger Son, was to be considered as an Advancement of the Father?

His Honour in this Case was of Opinion, that the youngest Son was not Heir at Law within the Statute. Heir at Law is there to be considered and understood κατ' ἐξοχήν.

It



It was objected, that by the Words of the Statute, *viz.* *Other than such Child or Children not being Heir at Law*; it is plain, there may be Children which may be deemed Heir at Law besides the eldest Son; but the Words there mean 'other' than such younger Child or Children'. *Executio probat Regulam*. He also thought this a Settlement by the Testator, and decreed he should be brought into Hotchpot according to the Statute.

### Eastgood *versus* Styles, 5 Geo. II.

( 26. )  
Bond given  
by a Husband  
before  
Marriage to  
settle Free-  
hold Lands.

A Bond was given by a Husband before Marriage, where-  
by he agreed, within four Months after his Marriage,  
to settle upon his intended Wife Freehold Lands for her Life,  
worth 100*l.* *per Annum*, Remainder in Tail to the Issue of  
the Marriage; or in Default thereof his Heirs or Executors  
to pay her 2000*l.* The Husband died within four Months  
after the Marriage, leaving Assets, and by Will gave his Wife  
an inconsiderable Freehold, *viz.* One House and Copyhold  
of Inheritance amounting to 85*l.* *per Annum*.

A Bill was brought by the Creditors and Legatees of the  
Husband, to compel the Wife to accept of the 100*l.* *per Ann.*  
only, exclusive of what was given her by her Husband's Will;  
or else, that what was given her by the Will might be deem-  
ed a Satisfaction of the Bond. And by the Counsel for the  
Plaintiff it was insisted, that if the 85*l.* *per Annum* was not  
to be esteemed a compleat Satisfaction of the Bond, yet that  
it ought to go *pro tanto*. Decreed *per Jekyll*, that the Wi-  
dow was not intitled to the 2000*l.* but the Heir should con-  
vey the 100*l.* *per Annum* to her, and that she should also  
have the Lands of 85*l.* *per Annum* devised to her by the  
Will.

The Plaintiffs appealed from this Decree, and the Counsel  
*pro Quer* cited the Case of *Bird and Young*, 1723. in Chan-  
cery, which was a Bond before Marriage conditioned to leave  
the Wife an Annuity of 250*l.* *per Annum*, and the Husband  
died about a Month after Marriage, and devised her Lands  
of 120*l.* *per Annum* for Life, leaving Assets; held *per Price J.*  
who heard the Cause, that it should be deemed a Satisfac-  
tion in Part of the 250*l.* *per Annum*. Reheard by *Maccles-*  
*field* Chancellor, who varied the Decree; but upon Appeal  
to the Lords, Justice *Price's* Decree was confirmed.

The following Cases was cited, 2 *Vern.* 709. *Blandy and*  
*Widmore.* 2 *Vern.* 558. *Wilcox versus Wilcox*, and *Savile and*

*Savile*, which was relied on for the Defendant; *vide Mod. Cases.*

King Chancellor thought this Legacy was intended as a Bounty, and not as a Satisfaction; he considered when Devises of this Nature had been construed as a Satisfaction, and when not; the Devise, when it goes in Satisfaction, must be of the same Nature with the Thing to be performed; not Money instead of Lands, nor *vice versa*; nor, as in the present Case, Copyhold Lands instead of Freehold; for in those Cases it is to be looked on as a Bounty; the Devise must also be a compleat Satisfaction, and not a partial one of an inferior Value, for such could never be intended a Satisfaction. He therefore affirmed the Decree.

*Painton versus Berry & Ux', & al',  
Administrators of Thornton de-  
ceased, May 6. 1732. 5 Geo. II.*

**T***Thornton*, Uncle to the Defendant's Wife *Berry* who (27.) was his Niece, by his Will gives the Interest of his Legacy with Personal Estate to his Mother for Life, and then devised Proviso a 100*l.* Legacy, & *inter alia*, 500*l.* to *Francis* the now Defen- Person mar- dant, and 10*l.* also for Mourning; and then as to the Resi- ries with due, he gave the same to his said Niece, provided she marry Consent of two Persons. with the Advice and Consent of Mr. *Lyddall* and Mr. *Clarke*; and in case she happen to marry otherwise, he devised the same to the now Plaintiff *Painton*; one of the Persons named, *viz.* *Clarke*, died soon after the Testator, *viz.* in 1713. and afterwards in 1729. the Defendants *Berry* and his Wife intermarried without any previous Application made to the Survivor *Lyddall* for his Consent. This Bill was therefore brought against the Administrator, &c. to have the *Residuum* given over to the Plaintiff on this supposed Forfeiture, the Marriage being without Consent. *N. B.* The Defendant *Berry* denied by her Answer she had any Notice of the Devise or Proviso when she married, and it was not proved she had. The principal Question was, whether this was a Condition precedent or subsequent, *viz.* Whether it was to be performed before the Legacy of the *Residuum* vested; or only a Condition subsequent to divest the Interest?

For the Plaintiff it was insisted, that this was a Condition precedent; and it was compared to the Case of *Fry and Porter*, 1 *Vent.* 199. and *Falkland and Bertie*, 2 *Vern.* 333. And it was argued, that *Clarke* and *Lyddall* were in the

L

Nature



Nature of Guardians, and that the Power given to them survived; and it was the Intention of the Testator to continue his Care over to his Niece till she should marry; and she ought to have applied to *Lyddall* the Survivor for his Consent; and cited the Case of *Rogers and Pain*, May 14. 1728. Where a Bond had been entred into by the Husband on an intended Marriage, in Consequence of an Agreement with the Father of the Wife, and a Portion of 1000*l.* the Condition of which was to pay 1000*l.* to a Daughter of the Marriage within so many Months after her Marriage, provided it was with the Consent of four Persons, or the major Part of them: In that Case two of the four Persons died, and the Daughter married without the Consent of the Survivors; and a Bill being brought against the Father the Obligor for the 1000*l.* it was dismissed; because the Daughter had not done all she could, by asking the Consent of the Survivors. And even supposing this a Condition subsequent, it was not impossible to be performed in Substance; as in 1 *Inst.* 220. *b.* A Feoffment on Condition to infeoff the Feoffor, his Wife and their Heirs, where if the Wife dies, a Re-infeoffment shall be made to the Feoffor and his Heirs.

Solicitor General *cont.*: This is a Condition subsequent; there are no precise Words or any Method of placing a Condition that can distinguish it from being precedent or subsequent; but whether it is or not must be collected from the Consent and Intent of the Parties. Here the Residue on the Death of the Mother must vest in the Defendant immediately, tho' unmarried; for it cannot go over to the Plaintiff, but upon the Defendant's Marriage contrary to the Directions in the Will; and if the *Residuum* did not vest in the Defendant upon the Mother's Death, the Testator with Respect to such Residue must be said to die Intestate.

The Provifo therefore is a Condition subsequent and to divest an Interest; and the Death of one of them two Persons whose joint Consent was requisite, makes such joint Consent impossible; and such Consent is not, as was said, an Interest that would survive, but a meer naked Power; and there can be no Doubt, but a Condition subsequent, becoming impossible by the Act of God, must be dispensed with, and the Devise over to the Plaintiff is therefore become void. The Case of *Fry and Porter*, and *Falkland and Bertie*, were of Real Estates, and this only the *Residuum* of a Personal Estate, which is to be governed by the Rules of the Civil Law.

Conditions in Restraint of Marriage are void by the Civil Law; but this Court has admitted of some Restrictions with respect to Marriages under certain Limitations. But in the present Case here is a beneficial Interest vested to be divested

on the Non-performance of a subsequent Condition, which is now become impossible, and is therefore such a Restraint on Marriage as is void both by the Civil and Common Law.

The Bill of the Rolls was dismissed with Costs; and *per King* Chancellor, being of the same Opinion, affirmed the Decree as to the Point in Question, but reversed it as to Costs.

Lord Warrington *versus* Lee, May 14.  
1732. 5 Geo. II.

ON an Appeal from the Rolls this Bill was brought by the Plaintiff to have Satisfaction for the Sum of 2000*l.* for which he was only a Simple Contract Creditor; and the Question was upon the following Words of a Will, whether the Testator had subjected his Real Estate to the Payment of his Debts? the Words were these,

( 28. )  
Bill brought  
for Satisfaction  
for  
2000 *l.* by a  
simple Con-  
tract Credi-  
tor.

“ As to all my worldly Estate which it has pleased God to bless me with, I give and dispose of the same in the Manner and Form following, that is to say, *Imprimis*, I will that all my Debts be discharged and paid; and then devise Lands, &c. to particular Persons. The Testator died leaving a great Real Estate, but little or no Personal. Decree at the Rolls, that the Real Estate was not liable. It was argued *pro Quer*, that the Words (*worldly Estate*) comprehended as well the Real as the Personal Estate, and meant all the Testator had in the World. It was the Testator's Intention, that before any Person should take any Part of his worldly Estate, that his Debts should be first paid and discharged. Indeed if a Man directs by Will generally that his Debts shall be paid, it is no more than what the Law says, and his Personal Estate, which is the proper Fund, shall only be liable. But here these Words are not to be considered as of Course, but manifest a plain Intent to subject the Real Estate to the Payment of the Testator's Debts. It is said, the Word made use of by the Testator is (*give*), which is applicable only to Personals, and not (*devise*), which is properly relative to Lands. But to prove this makes no Difference they cited 1 *Vern.* 411. *Cloudsly versus Pelham*; there the Words were, (*willing*) *his Debts should be paid*; and held the Real Estate liable; so here it is (*I will*). Besides, in another Part of the Will, when the Testator is giving away the Plaintiff's Estate and other Personals, he makes use of the Word (*Devise*), which shews he never understood any Difference between the Words.

The



The following Cases were cited, 2 Vern. 708. *Trott & al* versus *Vernon*; 2 Vern. 228. *Allcock* versus *Sparkhawke*; 2 Vern. 690. *Beachcroft* versus *Beachcroft*; which last was relied on as a Case in Point, tho' it was objected, that the Word *Remainder* in that Case, viz. *Out of the Remainder of my Estate I give, &c.* shewed a precedent Devise of it before; and the Case of *Harris* versus *Ingleton*, 10 March 1730. at the Rolls; *William Ingleton* by Will devised in these Words, "And as touching such worldly Estate which God has blessed me with, my Debts being first paid and satisfied, I will and devise the same in Manner following". And in that Case, a Bill brought by a Simple Contract Creditor, (the Personal Estate not proving sufficient,) it was decreed, the Freehold and Copyhold were both liable. In the Civil Law, as in the Case of Bankruptcy here, there is no Priority or Superiority of Debts, and in Conscience they are all the same, and that is the Foundation this Court goes upon when the Intent is clear.

Counsel for the Defendant; The Real Estate is not liable to the Plaintiff's Demand; and if such general Words as are here, were to be construed to affect Real Estates, it would render the Titles of all Persons claiming under Wills very precarious. He said, that after the Clause in the Will whereby the Defendants are directed to be paid, the Will goes on, *Item, "I give to M. S. an Annuity of 100*l.* per Annum, to be paid out of my Manors, &c."* He admitted, the Words (*worldly Estate*) were large enough to affect the Real as well as Personal Estate; but the Question is here, Whether it was the Testator's Intent to charge both? and it is plain it was not; that general Direction of ordering all his Debts to be paid, is no more than what the Law says, and therefore *Expressio eorum quae tacite insunt nihil operatur*. But here it is said *Imprimis*, which is insisted to be of the same Import as in the first place, and that therefore imports a Priority to be done; and therefore say the Counsel for the Plaintiff, the Lands are therefore devised upon Condition, that my Debts be paid out of them in the first place. But the Word *Imprimis* has no such Import, it only denotes the Order of speaking, and serves for no other Purpose than to distinguish the subsequent Devises that they should not coincide. A Person cannot speak all his Words at once, and this therefore differs from all the Cases cited, where it appears the Testator had an Eye to his Real Estate. In the Case of *Beachcroft* and *Beachcroft*; there the Words were, (*Out of the Remainder of my Estate, and after my Debts paid, to my Wife;*) so that in that Case there is a plain Intent to charge the Land: So the Case of *Trott* versus *Vernon*, and *Harris* versus *Ingleton*; in

in both these Cases the Words (*in the first place*) plainly shew the Testator's Intent; and there is no Case in all the Books where such general Words in a Will, with a particular Charge on Lands afterwards, as in the present Case of an Annuity, have ever been held to make a Real Estate answerable for Debts; not one of the Cases cited have any particular Charge laid on the Land.

Are the Debts to be an Incumbrance to the Annuity charged on the Lands? the Testator by mentioning such particular Charge therefore shews his Intent only was to affect the Lands with that, and not with the Debts; besides, if the Words were doubtful, they ought not to be interpreted to the Disinheritance of an Heir at Law; which is the present Case.

King Chancellor reversed the Decree, and held the Lands were liable to the Plaintiff's Demand.

Gordon *versus* Rains, 5 Geo. II.

THIS was a Bill brought by the Husband, as Administrator of his Wife, in order to recover the Sum of 6000 l. Portion, due and vested in his Wife; and the Question arose upon the following Trust of a Term; the Trust was declared to be, "That in case there be no Son of the Marriage born in the Life-time of *Henry Rains*, or after his Decease, or if there be, and all of them die before the Age of twenty-one, and in either Case there shall happen to be one or more Daughters born in the Life-time of the said *Henry Rains*, or after his Decease, who shall attain the Age of sixteen Years; in that Case the Trustees, after the Decease of the said *Henry Rains* or *Elizabeth* his Wife, shall by Demise, Sale, &c. or by Receipt of the Rents, &c. raise and levy the Sum of 6000 l. (which was the present Case,) to be paid at the Age of sixteen, in case either *Henry* or *Elizabeth* shall be then dead.

( 28. )  
Bill by the  
Husband as  
Administra-  
tor of his  
Wife, to re-  
cover 6000 l.  
Portion vest-  
ed in his  
Wife.

There was also a Clause of Survivorship, in case of several Daughters, with respect to the Portion or Portions of any that should die in the Manner therein mentioned. The Fact was: The Plaintiff's Wife was the only Issue of the Marriage, who lived till the Age of twenty-two Years, but happened to die before her Father or Mother *Henry* and *Elizabeth*, and they being also both since dead, this Bill was brought against the Defendant a Remainder-man for the said Portion. And the Question was, whether this Sum of 6000 l. was vested in the Daughter, so as to intitle the Plaintiff to it as her Administrator? It was argued for the Plaintiff, that this Sum of



6000 l. was a vested Interest in the Daughter immediately upon her arriving at the Age of sixteen, tho' not payable indeed till after the Decease of *Henry* or *Elizabeth*; otherwise what can be the Meaning of the Words (*A Daughter who shall attain the Age of sixteen*;) the Clause of Survivorship shews it was vested, else how could it survive?

*A. T. & C. Counsel cont'*: Upon the Trusts of this Deed the Plaintiff is not intitled to this Sum of Money; the Contingency, which was to intitle his Wife to it, not happening during her Life, (which was the Death of *Henry* or *Elizabeth* in the Life-time of the Daughter, after she attained the Age of Sixteen.) He said, it was now a general Rule not to be departed from, that wherever Portions are to be raised out of Lands, there is no Difference between Vesting and the Time of Payment; for when they are to be raised out of Lands, they never are vested till they are become payable; but in the Case of Personal Legacies it is otherwise; there the above Difference is allowed, and upon the Death of the Party intitled, such Interest is transmissible to the Representative; and to prove this Distinction he cited *Poulet versus Poulet*, 1 *Vern.* 204. and 2 *Vent.* 366. S. C. and said, the first Time it was so settled was in a Case of *Brown versus Brown*. In the present Case therefore the Daughter's Portion was never raisable; the Contingency of Failure of Issue Male did not happen in the Daughter's Life-time, for *Henry* and *Elizabeth* were both then alive, and as long as they lived there was a Possibility of Issue Male, so that it could not be a vested Interest in the Daughter at her Age of sixteen, which is only Part of the Description; the whole Sentence must be taken together, which is, "Such Daughter as shall have attained the Age of sixteen after the Decease of the said *Henry* and *Elizabeth*." As to the Question, if this 6000 l. did not vest at the Age of sixteen, what can be the Meaning of those Words? Why the same Answer may be given as in all other Cases of this Nature, viz. it was to ascertain that she should not have it before; if she had died an Infant of six or seven Years old, or at any Time under the Age of sixteen, tho' her Father and Mother had been both dead, it would not have belonged to her in such Case till the Age of sixteen. The Clause of Survivorship does not necessarily imply that an Interest must vest in the first Taker; as if a Legacy devised to *A.* at the Age of twenty-one, and in case he dies before that Time, to *B.* in this Case it shall go to *B.* tho' it never vested in *A.* 2 *Vern.* 207. *Miller versus Warren*, it is a new Gift.

*King* Chancellor, assisted by *Raymond C. J.* and *Jekyll* Master of the Rolls, were all of the same Opinion, that the Bill should be dismissed. The *Attorney General* said, in all the

the Cases cited there were no Contingencies, or else, as in the Case of *Butler* versus *Duncombe*, 2 *Vern.* 760. the Contingency had happened.

Morice against The Bank of England,  
Mich. Term. 6 Geo. II.

THE Plaintiff, as Executrix of her Husband *Humphry Morice* deceased, filed her Bill in this Court, and in April 1732. obtained an Injunction, upon the Defendants praying Time to Answer, but never served it till the September following; the Defendants in the mean Time having got a Verdict at Law, and also put in their Answer in this Court; it was now insisted on for the Defendants, that this Injunction should be discharged; because the Plaintiff had acted irregularly, in not serving the Process before the Answer came in, it being an Injunction for want of an Answer, and it is to be regarded only as an Injunction from the Service on the Party, and not from the *Teste*. Formerly it was the Practice, upon coming in of an Answer, that the Injunction was dissolved of Course, unless the Plaintiff made a special Motion for its Continuance. Compared it to a Writ of Error with too long a Return, which is upon that Account no *Supersedeas*.

( 29. )  
Motion to  
discharge  
an Injunction  
for Irregularity.

On the other Side it was argued, that the Plaintiff is perfectly regular in serving his Injunction, which in this Case could only stay Execution, the Action being brought at Law before the Bill filed; it is an Injunction upon the Party till Answer and further Order; here has only been an Answer put in, but no further Order; the Defendant ought therefore, as in other Cases, to move for an Order to dissolve it *nisi*, and not move to discharge it absolutely.

*King Chancellor*: It is an Abuse of the Process of this Court to keep a Writ in a Person's Pocket so long and make no Use of it, and afterwards serve it on the Party. Discharged the Injunction, but gave Leave to the Plaintiff to move for an Injunction the next Seal upon the Merits; and in the same Cause it was moved, that the Defendants were guilty of a Breach of the Injunction by suing out a *Sci' fac'* upon the Judgment *Quando Assets acciderint*; and it was said such a *Sci' fac'* is in the Nature of a new Action, the former Suit was against the Executrix *in auter droit*, and this *Sci' Fac'* was in order to obtain Judgment *de bonis propriis*; but it was resolved that it was not a new Suit, but only a Continuance of the former.



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A  
REPORT  
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CASES  
IN THE  
*KING's BENCH, &c.*

In the Fifth, Sixth and Seventh Years of his present Majesty King GEORGE the Second; during which Time the Lord *Raymond* and Lord *Hardwicke* were Lord Chief Justices of *England*.

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In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of *Edward Sayer*, Esq;) for John Worrall at the Dove in Bell-Yard near *Lincoln's Inn*. MDCCXL.



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Lloyd *versus* Jones, Hill. 5 Geo. II.  
1731. C. B.

**A**CTION for Words in C. B. Declaration sets forth, <sup>(1.)</sup> that the Plaintiff was sworn an Attorney in the <sup>Action for</sup> Common Pleas according to the late Act of Parli- <sup>Words.</sup> ment, and that being *well qualified for a Solicitor in Chancery*, he endeavoured to get himself admitted, but that the Defendant having spoken false, scandalous and malicious Words of him, *viz. that he could prove him guilty of Perjury and Forgery, and he deserved to be transported*; he was by reason of this Aspersions refused to be admitted, &c. for which he brought his Action, and Verdict *pro Quer'*; upon which a Writ of Error is brought.

Mr. S. Counsel argued for Plaintiff in Error, that where a Person is charged with several Facts in a Declaration, and *intire Damages* are given upon the *whole*, if it appears upon the Record that some of the Facts are not actionable, the Judgment is erroneous; in this Case there are Words in the Declaration that are not actionable, *viz. You deserve to be transported*. To say a Man deserves to be transported is not actionable. *2elo. 10 & 34.* Thou art a perjured Knave, and that will be proved by a Stake that stands between the Ground of *J. S.* and *J. D.* and adjudged not actionable, for tho' the first Words are actionable, yet they are so qualified by the *subsequent Words*, that an Action will not lie. *Poph. 210.*

Mr. D. Counsel *com'*: In this Case there are *special Damages* laid in the Declaration, so that provided the Words were not actionable in themselves, yet an Action will lie for the *special Damages*; but admitting special Damages had not been alleged, yet the Words are actionable in themselves. Perhaps where the Words are general, without any Charge, as you deserve to be hanged, transported, &c. an Action will not lie; but it is otherwise when there is a positive Charge.

*Per Cur'*: Judgment must be affirmed; the Words are not only actionable in themselves, but here are special Damages alleged, and we will not take it, that Satisfaction is made for the special Damage.



King *versus* Pownell, 5 Geo. II. B. R.

( 2. )  
Information  
moved upon  
the libellous  
Matter.

Information was moved for against the Defendant for sending the Prosecutor a Letter wherein were these Words, viz. *You are a Scoundrel, and defrauded the King of his Duty, I will prick you to the Heart, and call you to an Account.* The original Motion was made upon the Foot of a Challenge, but the Court inclining to think the Words did not import a Challenge, Information was moved for upon the Libellous Matter, viz. *You are a Scoundrel, &c.*

*Cur'*: The Words do not import a Challenge; but to call a Man a Scoundrel, and to reflect upon him in the Execution of his Office, is Matter of a libellous Nature, and deserves to be punished by Information. In *Barnardiston's Case*, Trin. 5 Geo. 2. Information was granted for sending a Letter to B. wherein were these Words, *You are a rascally Fellow and a Tom Fool, you had better have held your Tongue;* but B. was Lord of a Manor, and this Letter was wrote to him by a Copyholder. *The Court enlarged the Rule*, viz. *to shew Cause why an Information should not go for the Libel.* Note; This was afterwards referred by Rule of Court.

Perry *versus* Curtesan, Hill. 5 Geo. II.  
B. R.

( 3. )  
Sham Plea.  
*Per Cur'*: To  
plead such a  
Plea as he  
will abide  
by.

ACTION, &c. Defendant pleaded a *sham Plea*, to which the Plaintiff demurred, and gave the Defendant the common Rule, *to join in Demurrer within four Days*; before the Expiration of the Rule, the Plaintiff moved that Defendant should plead such a Plea as he would abide by; this was opposed, and insisted upon, that the Plaintiff could not make such a Motion which was *contra* to his own Rule, which gave the Defendant *four Days Time to join in Demurrer*; there never was such a Motion made before.

*Cur'*: There can be no Inconvenience in the Motion; on the other Hand, it looks like a Trick of the Defendant's to get over the Term; if the Demurrer stands, the Defendant will have the Benefit by it; if over-ruled, it is reasonable the Defendant should plead such a Plea as he will stand by, and then Trial may be had within Term. And *per Cur'*: The Defendant shall either stand by his Demurrer, or plead such a Plea as he will abide by.

Catherold

**Catherold versus Cooper & al, Hill.**  
5 Geo. II. B. R.

IN an Action of false Imprisonment against the Defendant & al, Commissioners of the Turnpike, Plaintiff was nonsuited, and now the Defendants came and prayed treble Costs according to 12 Geo. 1. (4.) Treble Costs prayed.

Mr. F. Counsel: This Motion is now improper, the Defendants should have prayed it at the Trial; in some Cases the Act directs there must be the *Judges Certificate*, but there is no such Provision in this Act. To grant this Motion would be to determine this Matter upon Affidavits without giving the Plaintiff an Opportunity to controvert the Facts. The Court held, from the Nature of the Thing, that the Defendants should have prayed treble Costs at the Trial; but only made a Rule to shew Cause. Vide the Case of *Devenish versus Burton, Hill. 7 Geo. 2. Double Costs granted upon Motion; per Cur.*

**Minor versus Wilson, Hill. 5 Geo. II.**  
B. R.

A Writ of Enquiry was made returnable a Sunday, and was executed upon the Monday following; and this was assigned for Error, and the Judgment reversed. So determined Trin. 3 Geo. 2. *Peach versus Pascall*, Vide 2 Salk. 626. *Harvey versus Broad*; ibid. *Daves versus Salter*. A Writ of Enquiry was returnable Tres Trin. which was Sunday, and the Writ was executed on the 14th which was Monday; and upon Error being brought, Judgment was reversed. Vide post. (5.) Error.

*At the Sittings in C. B. at Guild-hall*  
*coram Robert Eyre Milite, inter*  
*Beck and Timbrell, 5 Geo. II.*

ACTION for Goods sold and delivered, &c. the Defendant, in Discharge of the Debt, offered to give in Evidence Goods sold and deliver'd; Defendant offered a Bond for Performance of Covenants in Evidence. (6.)

dence



dence a *Bond for Performance of Covenants*, and relied upon the 2 Geo. 2. c. 22. Sed per E. C. J. *This Statute does not extend to Debts of that Nature, viz. to Bonds for Performance of Covenants upon Condition, &c. but only to mutual Promises upon simple Contract, or to Debts upon Bond for Money absolutely; for the Act does not intend that the Penalty shall be given in Evidence, but the Principal only, with the Interest which is legally due upon such Bonds. Vide Stat. 2 Geo. 2. c. 22. ad pedem. Vide Bank of England versus Morris, said there, Penalty was the Debt in Law.*

Perry & al' versus Trefusis, Term.  
Pasch. 5 Geo. II. B. R.

( 7. )  
Motion to  
set aside a  
Writ of En-  
quiry.

MR. F. Counsel moved to set aside a Writ of Enquiry. Action in B. R. upon a stated Account, and Judgment *pro Quer'*. On the 8th of February the Plaintiff gave Notice to have a Writ of Enquiry executed on the 17th before the Sheriff, between the Hours of eleven and twelve, but before that Time applied to B. R. to have the Writ executed before the Lord Chief Justice at the Sittings after Term; and obtained a Rule to shew Cause the next Day; the Day following at two a Clock the Plaintiff served Defendant with the Rule, but the Defendant, not having sufficient Time to shew Cause, suffered the Rule to be made absolute, without making any Defence. The Sittings began 15th of February, and were adjourned to the 22d, when the Writ (Defendant not appearing) was executed before the Lord Chief Justice *ex parte*. Mr. F. Counsel insisted upon two Things, 1st, That the Rule to have the Writ executed before his Lordship was gained by *Surprise*, Defendant not having sufficient Time to make his Defence and shew Cause, Rule being served upon him only at 2 a Clock on the same Day it was made absolute. 2dly, That altho' the first Notice, to have the Writ executed before the Sheriff, was regular, yet the making Application to the Court to have it executed before his Lordship, was a *Waiver of the Notice*, and that *fresh Notice ought to have been given*; for in all Cases upon Executions, upon Writs of Enquiry, *eight Days Notice is necessary*, and this Notice must be *exclusive of one of the Days*, and *inclusive of the other*; whereas in the present Case, from the Time of serving the Rule, *both the Days are inclusive*, and so the Notice irregular.

To this it was answered and resolved *per Cur'*: That the first Notice of executing the Writ of Enquiry before the Sheriff being regular, the Application to the Court was no Waiver of the Notice; nor was it necessary to give fresh Notice, or appoint any particular Hour for the executing it; the Court in these Cases take their own Time, and execute it when they think proper within the Sittings. This can be no Surprise upon the Defendant, he having had regular Notice of executing the Writ before the Sheriff; and he likewise had Notice before the Motion, that the Court would be moved to have it executed before his Lordship; so that altho' the Rule was only served upon the Defendant at two a Clock, being the Day the Rule was made absolute, yet it could be no Surprise, because he had Time before the Service of the Rule, and sufficient Notice to prepare himself to shew Cause.

Anonymus, Term. Pasch. 5 Geo. II.  
1732. B. R.

**P**ER Cur': The Court made a general Rule, viz. That ( 8. )  
where any Person moves for an Information, and has a General Rule nisi, if, upon shewing Cause, that Rule is discharged, the Party who made the Motion shall pay Costs: Note; This Rule was never strictly followed, but always held discretionary. Rule of Court.

Lampen and Hatch, Pasch. 5 Geo. II.  
B. R.

**A**CTION for Words; Judgment by Default; Writ of ( 9. )  
Enquiry executed; 10s. Damages given, and 13l. Costs Action for de incremento; whereas by 21 Jac. 1. c. 16 there shall be no more Words; Costs than Damages, when the Damages are under 40s. Judgment by Default. Plaintiff moved that the Judgment might be reversed for this Error. The Defendant prayed it might be reversed in Part only; viz. as to Costs, but that it might stand as to the Damages.

Sed *per Cur'*: The Judgment is intire, and must be reversed in toto.



Knock *ver.* Wilkins, Pasch. 5 Geo. II.  
B. R.

( 10. )  
Assault and  
Battery.

**A**CTION of Assault and Battery; Plaintiff gave Notice of Trial but did not proceed; Costs were taxed by the Master, and before Payment the Plaintiff brought a fresh Action. Mr. H. Counsel moved that all Proceedings might be staid till the Plaintiff had paid the Costs of the first Action.

Cur: You may have an Attachment for the Contempt, but we never stop Proceedings in these Cases, except in Ejectment.

Whithall *versus* Sir Geo. Saunders &  
*al'*, Pasch. 5 Geo. II. B. R.

( 11. )  
Evidence of  
a Wife de-  
nied, be-  
cause the  
Husband  
might re-  
ceive Advan-  
tage thereby.

**I**N a Trial at Bar in B. R. upon an Issue directed out of Chancery, to find who was Heir to Sir Thomas Coleby deceased; A. B. being sworn, it was objected there, she could not be an Evidence in this Cause, because her Husband had already received a Bond of 30 l. and was to be paid 20 l. more, if the Determination of that Cause went in Favour of the Party who had summoned him to give in Evidence. The Court doubted, whether this was a sufficient Objection to destroy her Testimony; and the Cam' Scac' being at that Time sitting, Mr. Justice L. being the puisne Judge, went up into the Exchequer Court to ask the Opinions of the Barons in this Point of Evidence; who were all unanimous of Opinion, that she could not be examined as a Witness; and accordingly she was put by, and her Evidence rejected.

Petty *versus* Hutton, Pasch. 5 Geo. II.  
B. R.

( 12. )  
Motion to  
quash the  
Writ, be-  
cause not  
returnable  
at a certain  
Day.

**A** Sci' Fa' being brought to revive a Writ of Error upon a Judgment in the Marshalsea Court; Mr. P. Counsel, moved to quash the Writ, because it was not made returnable at a Day certain, and cited the Case of *Eden versus Wills*, Pasch. 12 Geo. 1. Sci' Fac' to revive a Writ of Error upon a Judgment in C. B. and the Sci' Fac' was quashed upon Motion; because not returnable at a Day certain.

To this it was answered by Mr. M. Counsel, that when the Proceedings are by Process upon Bill of *Middlesex*, the Writ is always made returnable upon a Day certain, and therefore the *Sci' Fac'* must pursue the original Process; and this was the Reason, that in the Case of *Eden versus Wills* the *Sci' Fac'* was *quashed*; but the Practice of Proceedings in the *Marshalsea* and other inferior Courts is *otherwise*; the Writ there is always returnable generally at the next Court; and the *Scire Facias* in this Case pursues the original Process, which is sufficient. And the Court for this Reason held the *Sci' Fac'* well enough.

The King *versus* Walbourne, Pasch.  
5 Geo. II. B. R.

MR. A. Counsel, moved for an Information for not repairing the Highway; an Indictment had been brought, but the Grand Jury refused to find it; and an Affidavit being made of this Matter, and that the Way was founde-rous and out of Repair, *The Court made a Rule to shew Cause.* (13.)  
Motion for an Information for not repairing the Highway.

Billingsley *versus* Trapps, Pasch.  
5 Geo. II. B. R.

UPON a special *Capias* the Defendant craved Oyer of the Original, which was tested in the Vacation, whereas the special *Capias* bore *Teste the Term preceding*; the Original is the first Process that ought to issue out, and is what warrants the Proceedings upon the *Capias*; so that it is repugnant that the *Capias* should bear *Teste precedent to the Original*, and for this Reason Mr. S. Counsel moved, that the Plaintiff might give Oyer of such an Original as could warrant the Proceedings upon the *Capias*, and that the Defendant might have four Days Time to plead. (14.)  
Upon a special *Capias* the Defendant craved Oyer of the Original.

Mr. F. Counsel answered, that the *Capias* was only to bring the Party into Court, and that after Appearance it was of no further Use, but was out of the Question; that from the Necessity of the Thing, the *Capias* must in this Case be tested before the Original. An Original, tho' it be taken out in the Vacation, yet bears *teste* from that Time only; but it is otherwise in a *Capias*, which only can Issue out in Term-time; and therefore, from the Necessity of the Thing, must bear *Teste*, (when it is taken out in the Vacation,) as if it had issued



issued the Term preceding; and cited the Case of *Andrews and Dingley*, Trin. 3 Geo. 2. B. R. which was this: The Cause of Action arose in *Vacation*, the Plaintiff took out a special *Capias*, which was tested the *preceding Term*; and upon Motion to quash this Writ, the Court adjudged the Writ to be *well enough*; otherwise the Plaintiff must have stayed till the Term following, which would be inconvenient, for the Defendant might in the Interim move off.

The Court refused to do any Thing in the present Case; and said, if the Plaintiff was irregular, the Defendant might take what Advantage of it he thought proper. Vide post. Case 16.

### Roberts versus Holywell, Pasch. 5 Geo. II. B. R.

(15.) Motion for full Costs, and allowed on special Damages laid in the Declaration. IN an Action for Words the Plaintiff laid special Damages in the Declaration, viz. *Loss of Marriage; Verdict for Plaintiff, and 20 s. Damages.*

Mr. G. Counsel moved that the Plaintiff might have her full Costs; for it is not the Words, but the special Damages, which is the Cause of Action in this Case; and so it is held 1 Salk. 206. *Brown ver. Gibbons*, Cro. Car. 140. *Law ver. Harwood*.

D. Counsel cont: He admitted, that if the Judgment was Right, the Plaintiff must have full Costs; but he moved in Arrest of Judgment, that it is not any where alledged, that the Plaintiff was capable of contracting Marriage at the Time of making the Promise; and it appears by the Record, she was a Widow at the Time of bringing the Action; so it may be that at the Time of the Promise she was under Coverture. 2d Objection, That there is no Colloquium of Marriage set forth; and a Communication of Marriage cannot be intended, and therefore she does not appear to have any Cause of Action. Cro. Car. 322. *Brian versus Cookman*, 1 Rol. Rep. 79. *Sell versus Fairee*. 2 Bulst. 276.

Cur: There is a Colloquium of Marriage sufficiently set out in the Declaration; it is not necessary for the Plaintiff to alledge she was capable of Marriage; if it was otherwise, the Defendant might have proved it, and that would have been a proper Defence at the Trial; it is said, *per quod Maritagium amisit*, which could not be, had she not been capable of Marriage; and the Plaintiff had full Costs allowed.

Billingsley *versus* Trapps, 5 Geo. II.B. R. *Vide ante.*

IN an Action upon the Case Defendant pleaded, *quod petit* ( 16. )  
*audita Breve de Capias*, and then alledges, that the Ca- Plea.  
*pias bore Teste precedent to the Original, and before the Cause* Motion to  
*of Action accrued.* Mr. F. Counsel moved to set aside this Plea, set it aside  
 because there was *no Affidavit to verify it*; there is nothing of for Want of  
 this appears upon Record, it is Matter of Fact only, and Affidavit.  
 there ought to have been an Affidavit. And so or-  
 dered by the  
 Court, with  
 Costs.

Per Cur: The Plea must be set aside with Costs.

Throgmorton *versus* Smith, 5 Geo. II.

B. R.

EJECTMENT. The Lessor of the Plaintiff being an Infant, ( 17. )  
 S. Counsel moved that he should be compelled by Rule Ejectment.  
 of Court to appoint a Lessee who might be responsible for the  
 Costs, if the Plaintiff was nonsuited, or a Verdict found for the  
 Defendant. The Lessor is an Infant, and cannot bind himself  
 in common Rule; it is reasonable therefore he should nominate  
 such a Lessee as can. In the Case of *Noke and Windham, Pasch.*  
*12 Geo. 1.* the Defendant moved for a Trial at Bar, and the  
 Lessor of the Plaintiff, being an Infant, should appoint such  
 a Lessee as might be liable; and the Court made a Rule ac-  
 cordingly. In an Action *Qui tam* the Court will stay Pro-  
 ceedings till it appears who is the Prosecutor; and cited a  
 Case, wherein he moved to have Proceedings stayed till it  
 was known who was the Prosecutor; and it being alledged  
 that the Prosecutor was in *Russia*, the Court made a Rule,  
 that all Proceedings should be stayed till the Prosecutor re-  
 turned, unless he should find a substantial Person to give Se-  
 curity for Payment of Costs, if the Defendant had a Verdict.

A. Counsel cont: In Ejectment an Infant may make a  
 Lease. 2 Leon. 217. 3 Keb. 347. And if Judgment goes  
 against the Plaintiff, a common Rule, which is always given  
 in these Cases, will bind him.

L. Just. In the Case of *Noke and Windham* the Court  
 held, that the Infant should nominate a Lessee who should  
 be responsible; and by Consent of both Parties the Father of  
 the Lessee was appointed. And in the principal Case the



Court now made the same Rule, viz. *That the Infant should nominate a Lessee who might be responsible.*

Upon the Day of shewing Cause the Infant agreed to nominate his Mother the Lessee, who entred accordingly into the common Rule to pay Costs, &c.

( 18. ) **Cowell ver. Waller, Pasch. 5 Geo. II.**  
*B. R. Vide post.*

( 18. )  
Motion to  
shew Cause  
why an At-  
tachment  
should not  
go.

**M**R. M. Counsel moved to shew Cause why an *Attachment* should not go against the Defendant for not obeying an Award which had been a Rule of Court. And his Objection was, that there was no Affidavit made to verify a Breach of the Award; in the Case of the King and Whiting, the Court would not suffer the Affirmation of a Quaker to be read in Court, in order to ground an Attachment upon it. To this it was answered, there the Foundation of the Case was Criminal, and Quakers are precluded by the Act to give Evidence in Criminal Cases. In the Case of one Gasper, an Attachment was grounded upon the Affirmation of a Quaker; vide 7 & 8 W. 3. c. 34. Any Quaker, who shall be required on any lawful Occasion to take an Oath, shall, instead of the usual Form, be permitted to make his solemn Affirmation.

The Court seemed to be of this Opinion. But the Rule was enlarged.

**Mainard versus Harvey, 5 Geo. II.**  
*B. R. Vide post Case 22.*

( 19. )  
Scire facias to  
revive a  
Judgment.

**S**CIRE Facias to revive a Judgment; Defendant pleaded, that the Plaintiff had already executed a Ca' Sa'. This being a sham Plea to prevent Execution, the Plaintiff moved to have Oyer of the Ca' Sa', and cited a Case in Carth. 453. Shew Cause.

**Davies versus Stokes, 5 Geo. II. B. R.**

( 20. )  
Judgment in  
Ejectment;  
Defendant  
brought Er-  
ror.

**J**udgment in Ejectment; Defendant brought Error. F. Counsel moved, that he might enter into further Recognizance; an Affidavit being made of the Value of the Estate, and likewise that he might find other Sureties, he himself being poor and insolvent.

Mr. P. Counsel: Defendant must enter into further Recognizance; but the Words of the Act are exprefs, *that the Writ shall be allowed upon his own Security*; vide 16 & 17 Car. 2. §. 1, 3. the Words are, *In Writs of Error to be brought upon any Judgment in Ejectment, no Execution shall be thereby stayed, unless the Plaintiff in Error be bound, &c.* and so it was adjudged Mich. 2 Geo. 1. *Barlace versus Baker*. And of this Opinion was the Court. But Mr. P. Counsel desired Time to answer the Affidavit, as to the Value of the Estate; and a Rule was made accordingly.

### Moore versus Isles, 5 Geo. II. B. R.

**A**CTION of Debt upon Bond against an Heir, who (21.)  
pleaded *Infancy in Bar*, and that the *Parol might demur*. Debt upon Bond against an Heir, who pleaded Infancy in Bar.

Mr. B. Counsel moved to set aside this Plea, because it was not verified by Affidavit. But the Court denied the Motion, and said an Affidavit was not necessary.

### Mainard versus Harvey, 5 Geo. II. B. R. Vide ante Case 19.

**R**ULE to shew Cause why the Plaintiff should not have (22.)  
Oyer of a Ca' Sa', which was pleaded in Bar to a Sci' Fac', &c. The Court now discharged this Rule, and said, the Plaintiff might plead *Nul tiel Record*; the Case of *Theobald versus Long*, in *Carthew's Rep.* 453. was in Abatement only; when Defendant pleads in Bar a Judgment of this Court, he must give the Plaintiff a Note of the Roll, and of the Term, &c. but this is never done upon a *Capias ad Satisfaciendum*. Rule to shew Cause why Plaintiff should not have Oyer of a Ca' Sa'.

### Millet versus Finder & al', Pasch. 5 Geo. II. B. R.

**S**CI' Fac' against Bail; and upon the Day that the Procefs (23.)  
was returnable, but after the Court was up, they offered to surrender the Principal; but Plaintiff refused to receive him, and proceeded upon the Sci' Fac'. Mr. D. Counsel obtained a Rule, to shew Cause why the Sci' Fac' should not be set aside upon Surrender of the Principal. Scire facias against Bail.

Mr.



Mr. S. Counsel insisted, that regularly the Principal ought to be surrendered upon the Return of the Ca' Sa', but through the Indulgence of the Court, the Bail had Time given them to bring him in at any Time before the Return of the Scire Facias, and had so far indulged them, that if he was brought in upon the Return-day sedente Cur', the Court would receive him; but if the Principal died before that Day, it was at the Peril of the Bail, and they are in that Case chargeable. It was objected, that the Plaintiff had not given the Bail four Days Notice; but it was answered, that if the Sci' Fac' lie in the Office four Days before the Return, it is sufficient to give Notice on the same Day, and so it hath been determined upon solemn Argument.

And the Rule was discharged *per Cur'*; for the Principal must be surrendered before the Court is up.

**Forrest ver. Bennett, Pasch. 5 Geo. II.  
B. R.**

( 24. )  
Motion for  
Costs for an  
irregular  
Counter-  
mand.

**ACTION** *Qui tam*, &c. Mr. W. Counsel moved for Costs for an Irregular Countermand in a popular Action, and insisted, that two Days was not sufficient in this Case, it being distinguished from the common Case by the Statute. Vide 18 El. Shew Cause. Note; The Rule was made absolute without showing Cause.

**Lord Cadogan versus Cotes, Pasch.  
5 Geo. II. B. R.**

( 25. )  
Ejectment.

Affidavit up-  
on Honour  
refused.

**EJECTMENT**, upon Condition of Re-entry for Non-payment of Rent. Judgment being now moved for against the casual Ejector, it was objected, that the late Act of Parliament requires Affidavits to be made that Rent was in Arrear. His Lordship insisted, (being a Peer,) an Affidavit upon Honour ought to be taken; but afterwards submitted to make it upon Oath, *salvo semper Privilegio*. Lord Conningesby's Case was remembered, where Affidavit upon Honour was refused by the Court in Lord Chief Justice Pratt's Time.

Term. Trin. 5 Geo. II. 1732. B. R.  
The King *versus* Lowfield.

A Rule was made for the Defendant to pay Costs for not going on to Trial upon an Indictment, &c. Upon shewing Cause the Case appeared to be this: The Defendant, upon Application to the Court, obtained a Rule for a special Jury, and brought down the Record in order to proceed to Trial, but eleven of the special Jury only appeared; the Defendant had likewise obtained a Warrant from the Attorney General for a Tales, provided there should be defectus Juratorum, which he produced in Court, but did not pray a Tales; and it was under these Circumstances that the Costs were moved for against him.

( 26. )  
Rule to pay  
Costs for not  
going on to  
Trial upon  
an Indict-  
ment, &c.

Mr. P. Counsel: There appears no Foundation for the Motion, the Defendant hath done every Thing that was Incumbent for him to do; he hath brought down the Record, and produced in Court the Warrant for a Tales; if the Prosecutor was willing to go to Trial, why did not he move for a Tales? The Court never grant a Tales ex officio, notwithstanding there is a Warrant, if there was a Necessity for a Trial, it is as incumbent upon the Prosecutor equally with the Defendant to pray a Tales; the Warrant was produced, and he might have had the Benefit of it; but the Truth is, both Parties refused.

The Court said it was the Plaintiff's own Fault he did not proceed to Trial, and so discharged the Rule.

Doyley *versus* Daniel, Trin. 5 Geo. II.  
B. R.

ACTION in Assumpsit for Business done as an Attorney, and the Venue laid in Norfolk. A Rule was made to change the Venue to Essex. S. Counsel moved to discharge this Rule, and to change the Venue to Middlesex or London, upon Affidavit that this was for Business done as Agent to an Attorney, and that most of this Business was performed in London or Middlesex; and undertook to give material Evidence in which ever of these Places the Venue should be changed.

( 27. )  
Action in As-  
sumpsit, Venue  
laid in Nor-  
folk, Rule to  
change the  
Venue to Es-  
sex, &c.

T

Cur:



Cur: The proper Motion will be for the Plaintiff to amend his Declaration upon Payment of Costs, and then he may lay his Venue as he pleases. And a Rule was made accordingly.

### Bird ver. Smith, Trin. 5 Geo. II. B. R.

( 28. )  
Action by  
Administra-  
tor disconti-  
nued, who  
afterwards  
brought a  
fresh Action,  
&c.

**A**CTION was brought by an Administrator, who afterwards discontinued his Action without Payment of Costs, by Leave of the Court; the Administrator afterwards brought a fresh Action, which was grounded upon the same Cause of Action. And now Mr. S. Counsel moved to stay Proceedings in the second Action, till the Administrator had paid the Costs of the first. If the Court will put no Restraint upon Executors and Administrators in Affairs of this Nature, it gives them a great Latitude of being vexatious; they may discontinue Action upon Action, and yet the Party is without Remedy or Redress. But the Court refused the Motion, and said they would put no Terms upon Executors or Administrators; if they are nonsuited, or a Verdict goes against them, they pay no Costs.

### Cowell ver. Waller, Trin. 5 Geo. II. B. R. Vide ante Case 18.

( 29. )  
Award.  
Motion to  
shew Cause  
why an At-  
tachment  
should not  
go against  
the Defen-  
dant for not  
performing  
an Award.

**M.** Counsel moved to shew Cause why an Attachment should not go against the Defendant for not performing an Award which had been made a Rule of Court. The Parties entered into Bonds of Arbitration to submit all Controversies to Arbitrators, who had Time given them till the 17th of January to make an Award, and if they could not agree to determine Matters by that Time, then a Power to chuse an Umpire, who was to make his Umpirage on or before the 21 Febr. On the 14 Jan. which was before the Determination of the Power of Arbitration by Process of Time, they chose an Umpire, who likewise made his Umpirage before the 17 Jan. which was the Time limited for the Arbitrators to make the Award in. The chief Objection to the Award it self was, that altho' the Arbitrators might chuse an Umpire before 17th of January, yet that Umpire could not make an Umpirage before that Time; because the Chusing the Umpire did not absolutely determine their Authority, but they had still a Power left in them to make an Award; so that here are two concurring Jurisdictions existing at the same Time, which is absurd; and it was adjudged in 1 Levinz 302. Donovan ver-

fus

fus *Masfall*, and in *Raym.* 106. that the Umpirage is in this Case void; for tho' the Arbitrators may chuse an Umpire at any Time during the Continuance of their Power, yet the Umpire cannot act till the Arbitrator's Time is expired; he likewise cited *the Case of Reynolds versus Gray*, 1 *Salk.* 70 where it is held by *Holt C. J.* that if the Arbitrators chuse an Umpire before the Time allowed for their Award be expired, it is *ipso facto* void, tho' they absolutely resolve to make no Award themselves.

Counsel on the same Side objected, that an Attachment ought not to go; because it does not appear by *Affidavit* when the Umpirage was executed; it is only alledged he made an Umpirage on such a Day, and that the same was signed, sealed and delivered, but it does not appear when; so that it is probable that it might be executed after the Time limited by the Submission, and antedated to bring it within the Time, and make the Award good; and therefore in the Case of an Attachment it is necessary to verify by *Affidavit*, that the Award was made within the Time, and executed likewise; and of this Opinion was the whole Court. But as to the Validity of the Umpirage it self,

*Raymond C. J.* said, he thought that it was well enough; for altho' the Arbitrators did chuse an Umpire, who likewise made an Umpirage before the Time allowed for the Award was expired, yet he held the Umpirage good, because the Arbitrators had determined their Power by chusing an Umpire; and so is *Mitchell and Harris's Case*, 1 *Salk.* 71. *Tho. Jones* 167. 1 *Roll. Abr.* 162. Here are in this Case two distinct Powers given to the Arbitrators, viz. either to make an Award on or before the 17th of January, or to chuse an Umpire; and therefore, when the Arbitrators have once chosen an Umpire, that is an Execution of their Power, and determines their Authority; and of this Opinion were *Page* and *Probyn* Justices; but they gave no absolute Opinion in this Point, because the Rule was discharged for the Defect in the *Affidavit*.

## Perry versus Perry, Trin. 5 Geo. II. B. R.

**A**CTION for Words which were in themselves actionable, ( 30. ) and special Damages laid in the Declaration; upon Not guilty pleaded, and Verdict for the Plaintiff, and 5 s. Damages, Mr. Serjeant B. moved for Costs de incremento, because special Damages are laid in the Declaration, and so the Statute does not extend to this Case. In the Case of *Phillip* versus

Action for Words.  
Special Damages laid.



versus *Smith*, Trin. 11 Geo. 1. Action was brought against Defendant for speaking scandalous Words of the Plaintiff, and charging him and others with stealing his Cocks and Hens, and *special Damages were likewise laid in the Declaration*; a Verdict was found for the Plaintiff, and notwithstanding the Damages were under 40 s. yet the Court awarded *Costs de incremento*.

*Cur'*: The Words, as they are laid in the Declaration in this Case are in themselves actionable, and the special Damages are only Matter of Aggravation. It is alledged in this Case, that the Defendant spoke such and such Words, *per quod the Plaintiff lost his Customers*; the special Damages, as they are here alledged, are not actionable; for an Action will not lie for losing a Man his Custom; and therefore the Damages must be given in the Case upon the Words themselves. In the Case of *Phillips and Smith* there were two distinct Causes of Action, and the special Damages were as well actionable as the Words, and that was the Reason that full Costs were given in that Case. Vide 1 Salk. 206. *Brown and Gibbons*. Action for slanderous Words spoken by his Wife, viz. that she was a Whore, *per quod* he lost such and such Customers; Verdict for the Plaintiff, and Damages under 40 s. and the Question was, whether the Plaintiff could have full Costs, notwithstanding 21 Jac. 1. c. 16. *Et per Cur'*: The Plaintiff shall have his full Costs, for it is not the Words but the special Damages which is the Cause of Action; so held Cro. Car. 140. *Law and Harwood*, Pasch. 5 Geo. 2. *Roberts versus Hollywell*, quod videas ante Case 15.

### Hutchins versus Molting, Trin. 5 Geo. II. B. R.

( 31. )  
Action of  
false Impri-  
sonment;  
Defendant  
prayed  
Leave to  
plead double.  
AN Action of false Imprisonment. Defendant prayed Leave to plead double, viz. *Not guilty*; and a Warrant under the Hand and Seal of a Justice of Peace in America, who committed him for a Misdemeanor. It was objected, that these Pleas were *contradictory*; but the Court over-ruled the Objection; and said, in *Replevin* the Defendant may plead in *Avowry* and *Non Capit*; and so granted the Motion.

2

Hoare

Hoare *versus* Gates, Trin. 5 Geo. II.  
*B. R. Vide postea*, Hill. 7 Geo. II.

**A** *Assumpsit*. Defendant pleaded *non Assumpsit*, and *non Assumpsit infra sex annos*. Plaintiff replies, that in such a Term he took out a Bill of *Middlesex*, and then avers, *quod causa actionis accrevit infra sex annos ante prosecutionem Billæ prædictæ*. The Defendant rejoins, and says, that the Bill of *Middlesex* was taken out *post clausum Terminum*; and altho' Bills that issue out in the Vacation are entred as of the Term preceding, yet *in rei veritate* the Bill of *Middlesex* issued out *post clausum Terminum*, viz. on such a Day, and concludes *quod causa actionis non accrevit*, &c. To this the Plaintiff demurred; and on Demurrer the single Question was, whether this is a good Averment. (32.) *Non assumpsit pleaded, &c.*

Mr. D. Counsel insisted, that the Party is estopped to aver, that the Bill of *Middlesex* issued at any other Time than that on which it was entred; and cited 1 *Lutw.* 333, 334. *Aldworth versus Hutchinson*. 1 *Sid.* 271. *Baily versus Bunning*. A *Fi Fa* was sued out *Teste 4 Junii*; 6 *Junii* he to whom the Goods belonged became a Bankrupt, and the Jury moreover found, that the said Writ of *Fi Fa* was made out the 11 *Junii*, and executed the 14th. All this Matter being returned upon a special Order, the Question was, whether the Goods were liable to the Execution from the *Teste*, or from the Time that the *Fi Fa* was actually sued out; and the Court was of Opinion, that the Goods were liable from the Time of the *Teste* of the *Fi Fa*; and that from thence it shall be said *emanatio Brevis*, and altho' in Fact it did issue at another Time.

Mr. D. Counsel *cont'*: There is a Difference between a Bill of *Middlesex* or *Latitat*, and any other Writ, for that a Bill of *Middlesex* or *Latitat* may be sued out before the Cause of Action; and it hath been so held not only upon Motion, but upon special Demurrer. *Cro. Eliz.* 561. and such an Averment is not inconsistent with the Course of Proceedings. *Cro. Eliz.* 264. 1 *Roll. Abr.* 538. 2 *Keb.* 173, 198. 3 *Keb.* 212. What is done in Vacation is supposed to be done in the preceding Term. But the Question is, whether the Supposition is so strong that it will admit of no Averment to the contrary. The Court gave no Judgment, but adjourned it to a second Argument.



*In the Common Pleas.*  
**Kemish versus Betson, Trin. 5 Geo. II.**

(33.) **R**esolved per totam Cur: Where the Party will take the Benefit of 2 Geo. 2. c. 22. by pleading in Bar, or giving mutual Debts in Evidence, &c. they must be Debts of the same Nature and Degree, otherwise in the Case of an Executor it might work a Devastavit.

**Traverse ver. Wood, Trin. 5 Geo. II.**  
*B. R.*

(34.) **W**HERE a Writ of Error is brought, and Rule is made to assign Errors, if Notice is hung up in the Office, and Plaintiff in Error does not assign Error, Defendant may come and pray a second Rule, and if the Plaintiff does not then assign Error, he shall be nonpross'd; and so it was agreed upon Mr. W.'s Motion, which was upon a Writ of Error out of Ireland, an Affidavit being made that the Defendant did not know who was Attorney in the Cause, and that the first Rule was hung up in the Office, unless the Plaintiff assign Error in a Week's Time.

**Twisleton ver. Duell, Trin. 5 Geo. II.**  
*B. R.*

(35.) **R**ULE to quash a Scire Facias, because there were not fifteen Days between the Teste and Return. Mr. A. Counsel moved to discharge the Rule, and relied upon the 16 Car. 1. c. 6. §. 1, 7. that the Return is aided by the Statute, which expressly provides, that the Return shall be good notwithstanding there be not fifteen Days between the Quarto die and the Return. And Mr. T. and Mr. D. Counsel said, that so it was objected in two Cases in which they were Counsel; and therefore the Court discharged the Rule.

Raymond C. J. took Notice, that there was a Mistake in the Act, and that the Return-day, which is there called Crastino Ascensionis Dom', should have been Crastino Trinitatis.

Talland *ver.* Warren, Trin. 5 Geo. II.

B. R.

**A**CTION of Debt upon Bond payable 11 June. Defendant pleads Payment upon the 10th, upon which Issue was joined, and Verdict for the Plaintiff. ( 36. )

H. Counsel moved in Arrest of Judgment, that this was a bad Issue notwithstanding it was found for the Plaintiff, for it may be true, that he did not pay it on the 10th, and yet the Money might be paid upon the 11th. Vide Cro. Jac. 434. Holms and Brochet.

R. Counsel *cont'*: The Issue is, that the Money was paid *ante diem exhibitionis Billa*, *scil.* on the 11th of June, if the *scil.* be rejected the Issue is good after Verdict; and of this Opinion was the Court, being aided by the Statute 4 & 5 Anne, c. 16. which enacts, that Payment *ante diem* shall be deemed Payment *ad diem*.

Oldham *versus* Lack, Trin. 5 Geo. II.

B. R.

**A**CTION of Assault and Battery. Defendant pleaded, that he lived in the County Palatine of Chester, which he pleaded to the Jurisdiction of this Court; and it was now moved to set aside this Plea for Want of an Affidavit to verify, &c. It appeared only to be the Mistake of the Attorney's Clerk, who had an Affidavit but did not annex it to the Plea; and Mr. P. Counsel insisted, that a subsequent Affidavit might supply this Defect; and cited the Case of *Solennus versus Duvon*, Mich. 1 Geo. 2. Action against a Woman who pleaded Coverture; Plaintiff moved to set aside this Plea for Want of an Affidavit; Defendant came afterwards and produced an Affidavit, that in a Letter of Attorney then in the Hands of the Plaintiff's Attorney, one B. was mentioned as Husband to the Defendant; and this Affidavit was allowed, and the Plea held good; but the Reason was, because it appeared from the Plaintiff's own Confession, that the Defendant was under Coverture, and so no Occasion for Defendant to verify it by Affidavit; but otherwise an Affidavit had been necessary, and so it is in the present Case; and therefore the Plea was set aside.

The



The King *versus* Franklin, Term.  
Hill. 5 Geo. II. 1731. B. R. *Vide post*  
Case 39, 40.

(38.)  
Information  
for publish-  
ing a Libel.

Franklin was convicted upon an Information for publishing a Libel against the Government; and now Mr. B. Counsel moved that the Prosecutor should bring in the *Postea*, and that the *Jury Process*, &c. might be filed; and said such a Motion was granted in the King and Ward, and also in the Case of the King and Wright.

It was objected by the Court, upon the Information of Mr. M. that this was contrary to the Practice of the Court in these Cases, to hasten and oblige the Crown to bring in the *Postea* upon Motion; and that the Defendant could not move in Arrest of Judgment till the Prosecutor had brought in the *Postea* and given a Rule, &c. to the Defendant.

Mr. B. Counsel: There seems to me no Reason for such a Practice: In all Cases relating to the Revenue, Assize, &c. when the Crown is Prosecutor the Defendant upon Motion hath a Rule of Course to bring in the *Postea*; the same Reason in this Case, and stronger, for should the Prosecutor refuse to bring in the *Postea*, which perhaps may never be brought in at all, and so the Party be without Remedy. Rule *per Cur*, nisi.

At another Day Mr. Attorney General came and showed Cause; and alledged, that this Motion was contrary to Practice; that there never was one Instance that the *Postea* was ever filed in these Cases, but that it always remained in the Hands of the Clerk in Court; and that when it is brought into Court the *Distringas* is always annexed to it, and brought in along with it. The Defendant, if he pleases, may move to have the *Postea* brought in, which is the common Motion in these Cases in order to move in Arrest of Judgment. It is impossible the *Distringas* should be filed, there being no File for that Purpose in the Crown-Office; it is always annexed to the *Postea*, and cannot be separated from it upon Motion. As to the *Venire* he said, that was filed before the Motion was made, and if the Defendant had any Objection to that, it was open to his Inspection.

Mr. B. and Mr. F. Counsel *cont*: If the *Postea* and *Distringas* are brought into Court it will answer our Purpose. Altho' the *Distringas* is annexed to the *Postea* upon the Return, and is brought into Court along with it, yet it is always sent

sent back again to be filed; for it is no Part of the Record, nor is it entred upon the Plea.

*Cur'*: The *Distringas* cannot be filed, *there is no File in the Office for that Purpose*; the Defendant after Conviction may come at any Time within the four first Days of the Term, and upon Motion oblige the Clerk in Court to attend and bring in the *Postea*, he is intitled to it *de jure*; and this is the constant Practice in these Cases; and so made a Rule, that the *Postea* and *Distringas* should be brought into Court, and the *Venire* filed.

King *versus* Franklin, Hill. 5 Geo. II.  
B. R. *Vide ante* Case 38.

FRANKLIN being convicted upon an Information for Publish- (39\*.)  
ing a Libel, his Counsel moved to set aside the Verdict, the Trial being by a Jury who had no Authority; and objected, that a Rule being made in B. R. for a special Jury for the Trial, &c. the Sittings after Trinity Term expressly, and he, being then not tried, could not afterwards be tried by the same Rule the Sittings after Michaelmas Term, but that a new Rule should have been made by the Court, &c. and compared it to the Case of *Laver*, who, upon Motion to the Court to appoint a Day for Execution, a Rule was obtained, but at the Day of Execution was suspended by his Majesty. The subsequent Term new Application was made to the Court, and a second Day appointed, but his Majesty was then pleased to grant a further Reprieve, which occasioned a fresh Application, &c. The same Reason for a new Rule in this Case; for the old Rule being special, and restrained to a particular Time by express Words, *viz. At the Sittings after Trinity Term*, the Rule must expire with the Time, and therefore necessary to have a fresh Rule. It was further argued that this is the constant Practice in the *Common Pleas*, and that new Rules are always granted in Cases of this Nature; but what was chiefly relied upon was the Statute of 3 Geo. 2. for Regulation of Juries, which now enforced the Practice, and made it absolutely necessary to have a fresh Rule. *Vide* the Statute.

To these Objections the King's Counsel made three Answers. 1<sup>st</sup>, That the Objection was made out of Time; 2<sup>dly</sup>, Before the late Act of Parliament there would have been no Weight in the Objection; and 3<sup>dly</sup>, the late Act of Parliament does not extend to the Crown, and so the Crown is not bound or precluded by it. As to the 1<sup>st</sup> it was insisted, that



the Defendant was now too late to make any Challenge to the Array, for after a Challenge to the Poll, the Party is precluded to his Challenge of the Array; and so it is held in 1 *Inst.* 158. and laid down there as a Maxim, that after Challenge to the Poll, there can be no Challenge to the Array; there is no Precedent to impeach this Maxim; the Defendant in this Case falls within this Rule; he made his Challenge to Poll; and Captain *Wingfield* was struck off the Panel, and a *Tales* sworn in his Place; and so the Defendant is now too late to make Objections to the Array: Suppose a Rule is made for a special Jury, and the Parties proceed to Trial before a common Jury, the Verdict afterwards shall not be impeached; for the Defendant must either make Challenge to the Array, or let Judgment go by Default; but if he appears, and a Defence is made, he is by that precluded to make any Objection to the Jury afterwards; and so it was adjudged 13 *W.* 3. *Anonymus* Case, in an *Action for Words*.

2<sup>dly</sup>, It was said, that before the late Act of Parliament this Objection could be of no Weight; for before that Act the Authority of special Juries did not arise from the Rule of Court; for the Purpose of the Rule is only to have a fair Jury; and after that is once struck, the Rule hath had its Effect, and then the Authority of the Jury arises from the King's Writ; for a Jury cannot be returned upon a Rule of Court, but upon the *Disfringas* and *Venire* issuing to the Sheriff for that Purpose; that Part of the Rule, which limits the Trial to a particular Time, can be of no Force; for after the Parties have been before the Master, and a fair and impartial Jury is struck, that Jury is under the same Circumstances, and their Authority of the same Nature with all common Juries: Suppose this Rule had been limited to the first Sittings in Term, if the Cause be not then brought to Trial, would there be Occasion for a new Rule to try it at the second Sittings? it would be absurd to imagine it? the same Reason when the Rule is for Trial after Term. In these Cases a new Jury is never struck, nor does a new *Venire* issue for that Purpose, *Alias Disfringas* issues out; and the Continuance is entred upon that; so the Trial is upon the old *Venire*, and by the old Jury; *pari ratione*, when a Rule is made for a special Jury, and a Jury is struck accordingly, tho' the Trial be not precisely at the Time limited by the Rule, yet the Authority of the Jury is continued upon the *Alias Disfringas*; and yet there is the same Reason for a new Jury as for a new Rule. It is impossible to have a *Venire de novo* in this Case; for the Statute 7 & 8 *W.* 3. which gives the new *Venire*, does not extend to the Crown; and it is adjudged in 2 *Vent.* 173. that a new *Venire* is Error; a *fortiori* if there cannot

cannot be a *Venire de novo*, there cannot be a Rule *de novo*; for the Court cannot make a Rule to have that particular Jury returned; for that would be in Effect for the Court to strike the Jury; and tho' it is said to be the Practice of the Common Pleas, yet the Practice of our Court is not the Practice of another. But admitting this to be the Practice of the Common Pleas, yet the King is not included within that Practice, for it extends only to Civil Cases. And when the general Words of an Act of Parliament do not extend to the Crown, the general Practice of a Court shall not? There are no negative Words in this Rule; and tho' the Time is strictly limited to the Sittings after Term, yet it cannot negatively be inferred from thence, that a Trial subsequent to that Time will be erroneous; and when no Inconvenience can arise to the Party by extending the old Rule to a further Day, there can be no Necessity for any fresh Application to the Court for a new one. In all Cases upon Trials at Bar, where a Time certain is limited for the Trial, if at the Day there is a *Defectus Juratorum*, upon which the Trial is adjourned; yet there is never Application made to the Court for a new Trial at Bar *de novo*, but a *Decem Tales* is awarded, and the Trial is had upon the old Rule; and yet in that Case the Jury is struck in the same Manner as it is here, and so falls within the same Reason. As to *Laver's Case*, where Rules *de novo* are granted for Execution, that Case makes nothing for them; for there the Sheriff's Authority arises altogether from the Rule, and consequently expires with it; but in this Case the Authority of the Jury takes its Foundation from the King's Writ; and so long as the Writ continues in Force, so long the Authority of the Jury remains. There would therefore have been no Weight in this Objection before the 3 Geo. 2. and what Alteration that will make in the present Case is proper for the Consideration of the Court; which falls under the third Answer, *viz.* that the Act of Parliament does not extend to the Crown, and so the Crown is not bound or precluded by it.

All Acts of Parliament that are made for the Ease of Juries, and that prescribe particular Methods for the Form of Proceeding to be observed between Plaintiff and Defendant, unless there are particular Words to extend those Acts to the Crown, the Crown is not included within the general Words; which is the Reason that the Stat. 7 & 8 W. 3. gives a new *Venire*, does not extend to the Prosecutor when the Crown is concerned; and yet it is expressly enacted by that Statute, that if any Plaintiff or Demandant in any Cause depending in any of the Courts at *Westminster*, which shall be at Issue, shall bring or sue forth any *Venire facias*, &c. in order to the Trial of



of such Issue at the Assises, and shall not then proceed to Trial, that the Plaintiff or Demandant, whenever he shall think fit to try the said Issue, shall sue forth a *Venire de novo*; here the Words are as express as possible; any Plaintiff or Demandant cannot; yet because there are no particular Words to extend it to the Crown, no *Venire de novo* does ever issue at the Suit of the Crown. By 29 Car. 2. c. 3. *Writs of Execution shall not bind the Property of the Goods, but from the Time the Writ is delivered to the Sheriff*; but in Execution at the Suit of the Crown, their Property is always bound from the Teste of the Writ. In the Statute of Jeofails, Revenue Causes are expressly mentioned, otherwise the Crown had not been included within those Acts; the Statute 35 H. 8. c. 6. which gives a *Tales de Circumstantibus*, does not extend to Juries impanelled to try Causes between the King and Party; and therefore by the 4 & 5 P. & M. c. 7. the Crown is expressly mentioned. In the Case of the King and Meredith, Trin. 13 W. 3. upon an Information for Perjury, a *Venire facias* issued forth returnable *Tres Trin.* the then Attorney General died, and Sir Edward Northey succeeded him; the Cause did not come on to Trial, but Continuances were entred upon the *Distringas* for a Year; after Verdict it was objected, that no Continuances were entred upon the *Venire*; and yet the Court adjudged that Jury to be a sufficient Jury. In the Exchequer there never issues a *Venire*; and the Reason of this Practice is obvious, for the Stat. 7 & 8 W. 3. (which gives the new *Venire*,) does not extend to the Crown; the Act of 3 Geo. 2. is within the same Reason as these Cases. There are no particular Words to extend it to the Crown; and it is impossible, from the Necessity of the Thing, that the Crown should be included by it; for unless the Crown should have a new *Venire*, as hath been observed, they cannot have a new Rule; and the Crown cannot have a new *Venire*, because the Statute which gives the new *Venire* does not extend to the Crown; *ergo, &c.* But admitting the Crown to be included within the late Act, if it can have any Effect in the present Case, it will be in Favour of the Crown; for by the express Words of the Act, when a special Jury is once struck and returned, the Cause must be tried by that Jury; the Words are, *Which first Jury so struck as aforesaid shall be the Jury returned for the Trial of the said Issue*; admitting therefore this Act to have any Weight in the present Question, there could not have been a new *Venire*; the Cause must have been tried by the same Jury which was first struck and returned upon the old Rule.

To these Answers the Defendant's Counsel replied, That it was not too late to make the Objections. *In Gardiner's Case,*

5 Rep. 37. and in Cro. Car. 278. a Defence was made, and yet Objections were taken to the *Verdict*, the one in Arrest of Judgment, and the other in Error; and the Objection to both the Cases were to the Panel of the Jurors; in Gardiner's Case twenty-three Jurors were only returned, of which twelve appeared and gave Verdict; and tho' it was adjudged, that this was remedied by 18 Eliz. c. 14. yet if it had not been for that Statute, Judgment would have been arrested; in the other Case of *Fines and Norton*, in Cro. Car. 278. twenty-three Jurors only were returned upon the *Venire*, and in the *Habeas Corpora* there were twenty-four, the last of which, viz. *W. L.* was not returned upon the *Venire*, the whole twenty-four being returned by *Distringas*, twelve of them were sworn, whereof the said *W. L.* was one; and after Verdict this was held to be a manifest Error. The Objection in the present Case is to the Panel of the Jurors, there ought to have been forty-eight returned, whereas twenty-four have only been returned; which is as manifest an Error in special Juries, as where twenty-three only were returned upon common Juries; so if a bad Return be made to the *Venire*, a Writ of Error will lie after Verdict. 1 Rol. Abr. 800. It would be putting a Difficulty upon the Defendant, to oblige him to make his Objection *eo instanti*; where a Doubt arises, he ought to have Time to consider of it, to enable him to lay it properly before the Court. This Objection arises properly upon the Rule of Court, which is the best Judge of it's own Proceedings; it is not so much a Challenge to the Jury, as to the Proceedings of the Sheriff upon that Rule; and whether he acted according to the Directions of the Court is proper for the Consideration of the Court. The *Anonymus* Case, cited by the other Side, was upon a good Jury, there is no Distinction between a good Jury and a common Jury: Supposing no Defence had been made in that Case, could the Defendant have objected that the Jury was not a good Jury? the Sheriff is a proper Judge what is a good Jury; and that when he hath returned a fair Jury, be there a Defence or no Defence, it is the same Thing; a Verdict was never set aside because the Jury was not a good Jury. If the Plaintiff should move for a special Jury, he may wave his Motion, and try his Cause by a common Jury. Had the Verdict in this Case been by a common Jury, viz. by a Jury chosen by Balloting according to the late Act, the Conviction had been good; but in this Case the Authority of the Jury depends upon the Rule of Court; and altho' the Authority of Juries in general depends upon the King's Writ, yet the particular Manner of returning twenty-four depends upon the Rule of Court; and when the Rule falls, the Authority of the Jury is determined.



The Act of Parliament expressly prescribes that forty-eight shall be returned, but special Juries struck by Rule of Court are excepted out of the Act, so that these Juries have their Authority from the Rule of Court; but it is insisted on, that if the Act extends to the Crown, it is in this Case to be taken in Favour of the Crown; for it is said, the same Jury must be struck and returned to try the same Cause. The Act in this Case hath been complied with *ex omni*; a Jury hath been struck, and the same Jury returned, so the Intention of the Act hath been fulfilled in this Particular; and there is no Proviso made in the Act, that if the Trial should go off the same Jury shall subsist; the Intention of the Act is otherwise, and made to prevent Mischiefs arising from the Continuation of Juries; but should the Doctrine of the other Side prevail, the whole Force and Energy of the Act will be over-turned; the Act recites several Abuses in the Impanelling and returning Juries. Vide 3 Geo. 2. and for preventing of such Abuses, directs and prescribes the Balloting, to prevent Fraud in soliciting Juries, to prevent Mischiefs arising from the picking up Talesmen. There are likewise Words that import there must be fresh Juries; the Act likewise inforces an Attendance, by giving Power to the Judge, &c. it likewise provides that Jurors shall have Certificates of their Discharge from serving for two Years. But if this Construction prevails, the Act will have no Effect as to these Particulars; will not Juries continue as they did before the Act? will they not be as liable to be tampered with and solicited? Supposing a Design to have a packed Jury, the Method will be this; the Plaintiff will get a Rule for a special Jury, will have a Jury struck, will have twenty-four returned, and those he will continue upon the Distingas till he hath Time and Opportunity to mould them to his Purpose. But admitting the Jury cannot be corrupted, the Plaintiff may continue them till one dies, and by this Means Talesmen will be added as before. By the same Reasons that this Construction prevails in Criminal Cases, it will prevail in Civil Cases; and so the essential End of the Act will be intirely over-turned. It is further insisted upon, that there could be no new Rule in this Case from the Necessity of the Thing, because the Crown cannot sue out a new *Venire*, &c. wherever a new Law is introduced, the Practice of the Court must conform to the Intention of that Law, and not the Intention of that Law to the Forms of the Court: Where a Rule cannot subsist by Reason of a new Law, but it is necessary *ut res valeat* to have a new Rule, in that Case a *Venire* must issue of Course. *Bro. Ven. fac. pl. 30.* and tho' the Matter does not appear upon Record to intitle them to a new *Venire*, yet it may be suggested upon Record; for

if the Party can have Liberty, for the Sake of making Continuances, to suggest what is contrary to Matter of Fact, *a fortiori* where it is in Support of an Act of Parliament, which cannot subsist without such Suggestion. Supposing a *Venire* issue upon the Balloting Clause, will that preclude the Party to apply to the Court for a special Jury? this would be carrying the Act apparently further than was intended; for Trials by special Juries are in this Respect excepted out of the Act. The Statute for this Reason gives a general Direction, and takes no Notice whether a *Venire* issued before or no; for the Issue is the Thing the Act hath in View, and takes no Notice of the Process. Supposing before the Act a *Venire* was taken out, must Proceedings be upon that *Venire*? certainly no; therefore a new *Venire* may issue forth by Virtue of this Act; and tho' the Words of the Act are general, yet such Construction must be made as is consistent with the Meaning of the Act; in some Cases Continuances may be entred upon the *Venire*, as where the Array is quashed; nothing more certain, than that a new *Venire* issues of Course. *Bro. Ven. fac. Stanf. P. C. 155. b. Bendlow 56. b. 2 Rep. Rowland's Case. Venire may be quashed at the Suit of the Party. Alleyn 18.* In the Case of *Wright and Pindar*, an *Alias Venire* was awarded. In this Case, had there been a new *Venire*, the Intention of the Act would have been answered. The *Venire* ought to have been returned and filed, to convince the Court the Crown could not have another *Venire*; by the Continuance upon the *Venire* of *Viccomes non misit Breve*, the Crown may have as many *Venires* as they please. Suppose there had been no *Venire* at all, would a Defence have aided the Error? In the Case of *Young and Watson*, there was no Return to the *Venire*, and yet that was held Error after Verdict; the Court might have granted a new Rule after the old one was expired, and a *Venire de novo* would have issued in that Case. *2 Rol. Abr. 720. pl. 2.* If at the Return of the Inquest upon a *Venire*, a Writ comes from the King not to proceed, *Rege inconsulto*, and afterwards a *Procedendo* is granted, a new *Venire* issues, and not a *Habeas Corpora*; and so is *2 Rol. Abr. 721. pl. 7.* in the Case of *Whitbey and Quenssey*, *Hob. 130.* the *Habeas Corpora* was returned *album Breve*, and thereupon a new *Venire* was awarded. Note; In the Case of *Green and Cole*, *2 Saund. 257, 258.* Error was assigned upon this Misreturn of the *Venire*; and it was objected, that the Defendant might have challenged the Array, but that it was the erroneous Act of the Court to Misaward the *Venire*. As to Trials at Bar, where the Cause does not come on to Trial at the Day appointed, it is put off by Adjournment; and



and when the Trial comes on, the Entry upon the Record is made upon that Day which was first appointed; and in all these Cases the Adjournment is to a Day within the same Term; there is no Instance of Trials being adjourned to a subsequent Term, without fresh Application to the Court to obtain a new Rule. In Trials at Bar, if at the Day appointed there is *Defectus Juratorum*, a *Decem Tales* or an *Octo Tales* issues, which is a Continuation of the same Process, and so a great Difference between Trials at Bar by Adjournment, and Trials by special Juries.

Raymond C. J. delivered the Opinion of the Court; That there did not appear any Irregularity upon the Record to set aside the Verdict; he said the Act of Parliament was a beneficial Act, and ought to be supported; he then mentioned the Mischiefs which occasioned the making that Act, and the several Remedies that are applied in the Redress of them. *Vide 3 Geo. 2. An Act for the better Regulation of Juries.* The Act particularly prescribes, that no Jurors shall be returned which have served within such a Time, *i. e.* (two Years); it further provides, that no less than forty-eight shall be returned upon the *Venire*, unless in particular Cases, where, upon Application to the Court, a Rule is granted for a special Jury; so that by the express Words of the Statute special Juries are excepted; the Method therefore of proceeding by special Juries is in no wise altered, but must be in the same Form, and in the same Manner, as before the Act; the Statute indeed goes further, and says, after a special Jury is struck, the Jury so struck shall be the Persons returned for the Trial; but there are no additional Words to make it necessary for the same Jury to serve; for if these Words had been inserted, they would have excluded Talesmen, which would have been inconvenient in these Cases; the Case in Question is not included within the Words of the Act; and the Court cannot extend the Words of the Act to it; neither will the Intention or Force of the Act be any Ways impeached or offended by this Construction; it is insisted upon by the Defendant, that the Rule was specially confined to a Time, *viz.* to the Sittings after Trinity Term, and that in these Cases it is the Rule of the Court which gives the Authority to the Jury. The Court is of another Opinion, that in all these Cases the Authority of a Jury arises from the King's Writ; the Import of the Rule is to have a fair Jury struck before the Master, and after that is done the Return must be made by the Sheriff, as in other Cases, who returns the *Venire*, upon which the Power of the Jury depends; and tho' the Rule is to have the Trial at a Time limited, yet it is not restrictive; the Rule is *pro triatione* in general, and the

the Time limited shews only the Intention of the Court to have it tried at that Time, but it is not to be taken *negatively*, at that Time and no other; in this Case the Crown could not have a *Venire de novo*; and therefore from the Necessity of the Thing the Trial must be upon the old Rule. Before 7 & 8 W. 3. a new *Venire* could issue in some Cases, as upon a Challenge to the Array; so where the Verdict is imperfect, when there hath been a Misreturn of the Jurors, &c. in these Cases, and the like, a *Venire de novo* would issue. In *Alleyn* 18. it is said, an *Alias Venire* should be awarded, and not a *Venire de novo*; but he thought that an odd Case, and said he never before heard of an *Alias Venire*. In *Stiles* 32, 34. it is held a *Venire de novo* would go; but even in that Case there are contradictory Opinions; and tho' it was adjudged a *Venire de novo* should be awarded, yet it was held, that the same Jury should be returned. This Case hath a great Resemblance to the Case in *Stiles*, the same Jury is returned in this Case, only the Continuances are kept on upon the *Disfringas*, and an *Alias Disfringas* is awarded; in all the Cases cited by the Defendant there hath been the same Mistake either in impanelling the Jury, or returning the Writ; but when there appears no Defect upon Record, a new *Venire* never goes; 7 & 8 Will. 3. does not extend to Criminal Cases, so that Cases of that Nature remain as they were before the Act; before this Act *Venires de novo* have been granted, but never without the Consent of the Parties. It is said, that in C. B. in Cases of special Juries new Rules are always granted; admitting it to be so, it avails nothing here, for different Courts have different Forms, and their Practice varies in many Circumstances. When an Irregularity is complained of, the Party complaining must shew the Irregularity, and not put the other Party to vindicate his Proceedings, and shew that he is regular; there does not appear to be any Irregularity in the present Case; but the Court is unanimous, that the Verdict shall stand. Whether or no the Defendant was too late to make his Objection, he said, the Court would not determine, the Objection being over-ruled upon the Merits of it; but without Doubt in Cases of Irregularity Advantage must be taken of it in proper Season; otherwise no Advantage can be taken of it afterwards.

Mr. B. Counsel moved the Court, that the Defendant having given sufficient Security might not be committed before Judgment should be given.

The A. G. opposed the Motion, and said, there had been Instances where immediately after Verdict at *Nisi prius*, the Defendant had been committed, and so insisted upon his Commitment.

Z

Mr.



Mr. B. then moved in Arrest of Judgment, and desired a Day's Time to consider of it.

The A. G. refused to consent; and said, that when the Defendant was called to receive Judgment, then his Counsel might move in Arrest of Judgment; and so prayed the Defendant might be committed, and brought up to receive Judgment on the Day following.

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Geo. II. B. R. *Vide ante* Case 38, 39.

(40\*) Judgment being prayed against the Defendant, it was moved in Arrest of Judgment, that the Rule which was granted by the Court for returning a special Jury, and by Virtue of which a special Jury was returned, should have been suggested on Record. That this was an Objection arising upon the Record of *Nisi prius*; and tho' this Case is by a particular Exception taken out of the Balloting Clause, yet the Rule itself flows from the Authority of the Act; and therefore should have been taken Notice of upon Record, to shew that the Proceedings in this Case were not grounded upon the Rules of Common Law, nor yet according to the general Provision of the late Act upon the Balloting Clause; in this Case the *Venire*, the Return of the Process, &c. are entered in the same Form as Proceedings at Common Law; and if they are considered as such, there is a manifest Error. Rules for Trials by special Juries are taken by Exception out of the Act; it must be considered therefore by what Authority the Rule in this Case was granted; for before the Act, Rules of this Kind were never granted but upon Consent of Parties; the Power therefore which hath been exercised in this Case is wholly depending and flowing from the Act, and so it ought to have been suggested upon Record. The Act of Parliament excepts special Juries appointed by Rule of Court, and says further, that the Jury so struck shall be the Jury returned to try the Issue; and it is by this Authority that twenty-four only are returned. Supposing there had been no Rule at all, that undoubtedly had been Error; here does not appear to be any Rule in this Case, nothing of that Matter is suggested upon Record; and the Court can take no Notice of any Thing now but what appears upon Record; it is for that Reason that the Rule, which is the essential Part of a Trial of this Nature, ought to be entered upon Record. In the Case of *Savil and Candish*, Telw. 213. a *Tales de Circumstantibus* was awarded,

ed, and the *Tales* returned upon the *Postea*; but because it was not suggested upon the Record that the *Tales* were *Nomina Jurator' de novo apposit' secundum formam Statuti*, Judgment was arrested; for this ought to have been done, because at Common Law the Justices of Assize could not grant a *Tales* to supply the Defects of the first Jurors, which Power is merely by 35 H. 8. and for this Reason it ought to be particularly entred *Quod nomina jurator' de novo apposit' secund' formam Stat'*, to distinguish what is done by the Common Law and what is aided by the Statute. *This Case is of great Weight in the present Objection*, for in the Case before the Court there appears nothing to shew how this Jury was impanelled, whether by Common Law, or by Virtue of the Statute, and what makes a Suggestion more necessary in this Case than in the other; in this Case there might be Proceedings at Common Law, or it might be by Proceedings upon the Statute; whereas in the other Case the Jury was returned upon the *Postea*, which shewed that the Trial could only be by Virtue of the Statute; but it will be answered, that here the Entry will be made according to the established Practice. This Argument was insisted upon in *Teloerton* 23. and divers Precedents were shewn, where *Nom' jur' de novo, &c.* were omitted upon the Panel, yet the Court did not regard it; for it seemed to them that those Cases had passed *sub silentio*, and without Exception. *In all Cases where a new Law is introduced, which takes the Course of Proceedings out of the common Road, a Suggestion is always entered upon Record*; as where a *Venire* is directed to the Coroner upon a Challenge to the Sheriff; so where the Trial is *per Medietatem Lingua*; in these Cases a Suggestion is always made accordingly. When a Defendant is convicted of a Misdemeanor, and before Judgment claims the Benefit of the King's Pardon, and that is allowed, it is always suggested upon Record, *Nihil de fine quia pardonatur*; and so *Cro. Eliz.* 153. *Lee versus Curveton*; and 2 *Cro.* 207. *Strickland and Thorp*. Where a Defendant prays Leave of the Court to plead double, Suggestion is always made upon the Record *cum licentia Cur' secundum form' Stat' in ejusmodi Cas' edit' & provis'*. This seems to be a Case in Point; the Act provides that the Defendant may plead double by Leave of the Court; and where this Leave is once obtained, it is always entered upon Record as above, otherwise it would be Error; after the Restoration, in all Cases, where the Act of Indemnity was pleaded, the Party was obliged to suggest his Plea, that he was not the Person who struck the King's Head off, &c. and the Reason of this Suggestion was, because the particular Person was excepted out of the Act.

At



At Common Law, if twenty-three Jurors only were returned, it was Error; the late Act requires that forty-eight shall be returned, but special Juries are excepted out of the Act; in the present Case here are only twenty-four Jurors returned, which is Error, unless something appear upon Record to take this Case out of the general Provision of the Act; but nothing appears to this Purpose, and so there is a manifest Error; it does not appear this was a Trial by a special Jury, and so within the Exception of the Act, and the Court cannot *ex officio* take Notice of it. Unless the Rule be suggested upon Record, it will introduce Confusion and great Inconvenience. Suppose a Rule is granted, and the Cause comes on to Trial before a Judge who did not grant the Rule, how can the Judge take Notice of it? nothing of this Matter will appear upon the Record, and the Judge *ex officio* is obliged to see the Cause tried according to the Act, which, by the general Provision of the Act, must be upon the Balloting Clause, unless something appears particularly to take it out of the Clause. Upon a Writ of Error out of an inferior Court, where the Trial hath been by special Jury, and Objection is made to the *Venire*, how can the Courts above judge what is Error and what is not? and whether the Proceedings below were pursuant to the late Act of Parliament or not? it is impossible a right Judgment can be made, unless the Rule be suggested upon Record. Where there are several Causes of the same Nature depending in the same Court between the same Parties, and Rule is granted for a special Jury in one Cause, and another Cause is tried by a special Jury upon that Rule, should this be alledged as Error? could not the Rule which was obtained in the first Cause be produced as Evidence, and warrant the Proceedings in this? It certainly might; for the Court could not distinguish upon the Face of the Rule in what Cause it was granted, and so the Defendant could take no Advantage by the Error. Since therefore there may be so great an Inconvenience introduced on the one Hand, and there can none arise on the other, we hope the Court will make such a Determination as will be agreeable to Reason and Equity, *viz.* That it is necessary that the Rule should be suggested upon Record, and that the Omission of it is manifest Error.

Mr. A. G. Mr. S. G. & *al' com'*: This is an Objection equally arising in every Case since the making this Act; and the same Method hath been observed in all other Cases as hath been pursued in this, and there is nothing offered to induce the Court to alter the Method; but if it should be necessary to suggest the Rule upon Record, we are still in Time; for we have entered nothing yet but the *Similiter*, and so have still

still an Opportunity of amending the Roll of *Nisi prius*, and suggesting the Rule upon Record. It is insisted upon, that the late Act is an Introduction of a new Law; it is expressly provided otherwise by the very Words of the Act, by which it is enacted, *That upon Motion made in any of the Courts at Westminster-hall for a special Jury, that the said Courts may order a special Jury to be struck in such Manner as such Juries are usually struck. This Clause of the Act is made in Affirmance of the Common Law; and if at Common Law no Suggestion was entred on Record, in Trials at Bar, and Trials by special Juries, what Reason is there to make any in this Case? By the Act there is an express Reference to the old Method of proceeding; in this Case the old Method is therefore to be observed.* In Trials at Bar, such a Suggestion never was made either before or since the Act; and there is no Instance of a Trial's being set aside for this Defect. If there had been no Rule at all, the Trial had been illegal, and not warranted by the Act; the Party indeed in that Case could not shew Error upon Record; but this does not conclude him from all Remedy; for upon Application to the Court, the Court would set aside the Judgment for Irregularity. By the express Provision of the Act Trials by special Juries must be upon Application to the Court by Motion; there is a great Difference between Things that must be done upon Motion and those Things which must be entred upon the Award of the Roll. In the Case of the Coroner there is no Motion made to have the Venire directed to him, but it is done by Suggestion upon the Award of the Venire; and the Reason of this Direction is to prevent the Necessity of putting the Party to challenge the Array. When a Pardon is pleaded, the Entry is always, *Nihil pro fine quia pardonatur*, but it does not say how pardoned; and whether by Act of Parliament, or the King's Letters Patent. Where the Party hath Leave to plead double, it is always suggested upon Record; but this does not prove that the Omission of it would be Error; and yet in this Case it is not prescribed by the Statute to be upon Motion, but only in general, that it must be by Leave of the Court; and where the Provision of an Act is in such general Terms, it may be thought necessary, as the most secure Way, to enter it upon Record; but where the Act is so restrictive, as to confine the Party to apply by Way of Motion, it is never done. The Statute which prevents dilatory Pleas provides, that no Plea shall be received in the Office but upon Affidavit of the Party to verify his Plea; but the Affidavit is never entered upon Record; no Complaint of any Inconvenience arising from this Practice; for if the Party refuse to make Affidavit, the Office will never receive the Plea, or if received,



*the Court will set it aside for Irregularity.* There is given by this Act a Power to the Judge of Assize to direct, that less than forty-eight shall be returned; and yet this Direction cannot be suggested upon Record, either before the Issuing of the *Venire*, or upon the Return of the *Postea*. The Case in *Telo*, which is so much relied upon, is of no Weight in the present Question, the Trial by *Tales* is given intirely by the Statute, which in that Case is introductive of a new Law; for at Common Law there could be no *Tales*; and where-ever an Alteration is made either in the Process of the Court, or where the Trial differs from a Trial at Common Law, as in the Case of a *Tales*, a Suggestion is necessary, and it must be entered upon Record *secund' formam Stat', &c.* In this Case the Process of the Court is in no Respect altered; Proceedings by special Juries are left in the same Plight, and must be in the same Method as before; the *Venire* must be returned by the same Officer; and if in this Case a Suggestion is necessary, it is equally necessary upon the Balloting Clause. *Where a Rule is made to pay Money into Court, this Rule is never entered upon Record: Neither in Ejectment is the Rule, which the Defendant enters into to confess Lease, Entry and Ouster at the Trial, ever entered on the Roll; and yet to the full as necessary as in the Case in Question.* The Form of Proceedings by special Juries being a Method established by Rule of Court, if any Doubt arises relating to the Rule, it must be determined by the Court who granted the Rule. *If in C.B. several Actions of Trespass are depending between the same Parties, some by Original and some not, and a Dispute arises, on Error brought for Want of an Original, the Truth of the Fact must be determined in that Court where the Original first issued; and so no such Inconvenience can arise as pretended.* That Precedents were of Authority in the present Case, the Case of *Budley* 11 Ann. was cited.

To this the Defendant's Counsel replied, Although it was said, that the Rule might still be entered upon Record, yet it was not thought proper to insist upon that Point, which was liable to so many Objections, and might so easily have been confuted. The late Act hath made a great Difference in the Manner of appointing special Juries; before the Act a special Jury was never appointed but by Consent of both Parties; but the Act enables the Court *ad libitum*, upon the Prayer of either Party, to appoint them; the Case of double Pleading is a Case in Point, and stands unanswered; it is said, that the Statute directs that it shall be by Leave of the Court in general, but that the present Case is confined to Motion; this is no Distinction; for where a Thing is to be done by Leave of the Court, and where upon Motion, it is in Effect the same

*same Thing*; for Leave must be obtained of the Court by Motion, for the Court cannot grant *ex officio*, without Application upon Motion.

Unless upon special Juries the Rule be suggested upon Record, the Judge can have no Direction in what Manner to swear the Jury. Talesmen are excluded by the Balloting Clause; but it hath been adjudged, that in special Juries the Party is intitled to them. Unless therefore the Rule appears upon Record, what can induce the Judge to determine in what Cases the Party is intitled to a *Tales*, and in what not? Admitted, that before the Act there was no Necessity to suggest the Rule, &c. because no Difference in the Return of the *Venire*, as to special Juries and common Juries; but the Act hath now made it necessary; for by the general Provision of the Act *forty-eight must be returned*, except in special Juries; something therefore ought to appear upon Record to bring this Case within the Exception: Admitted likewise, that there was a Difference between Things done upon Record and Things done upon Motion. *But the Question is, where the Act hath introduced a new Law, whether the Court must not conform their Practice to the Intention of that Law; and if Error may arise upon Proceedings in this Law, the Proceedings ought to be suggested upon Record, to give the Party the Advantage of applying to Superior Courts in Order to have that Judgment reversed.* In the Case of dilatory Pleas, no Plea shall be received but upon Affidavit; but it is said the Affidavit is never suggested; nor is it necessary; for no Plea can be received but upon Affidavit; besides, what Occasion for a Suggestion, when Advantage may be taken of the Plea it self? for unless Affidavit, it is no Plea, and Plaintiff may sign Judgment. *In Budley's Case, there was Error appearing upon Record, and so that Case was not absolutely determined upon Precedents of the Practice of the Court; the Rule for bringing Money into Court is to be taken Advantage of upon Evidence, and cannot be suggested upon Record; for it is considered as Payment of so much Money, and as such is given in Evidence. Ejectments are not parallel to other Cases, they are always considered as Creatures of the Court; the Court will not permit the Plaintiff to release, will not permit the casual Ejector to bring a Writ of Error, and in all Respects are governed by the Directions of the Court; and so whatever relates to them cannot be introduced as Authorities in the present Case.*

*Per Cur'.* The Court delivered their Opinions separately to this Effect: The Determination of this present Case will depend much upon a Resolution lately delivered by the Court, which was *unanimous, that the late Act does not extend*



tend to special Juries, but leaves them as they were before at Common Law; before the late Act Rules were often granted by the Court for special Juries; but that Rule was never entered on Record; and yet Proceedings by special Juries was as much contrary to the Common Law before the Act, as they are now contrary to the general Method prescribed by the Act; it would be odd to adjudge it necessary to enter the Rule upon Record, when it is no Ways conducive to the Trial. By the Balloting Clause a new Law is introduced, but the Act leaves this Case to the Directions of the Common Law; the Method of Proceedings that hath been pursued in this Case, is agreeable to the Proceedings at Common Law, and therefore not erroneous. *This is an Exception in Arrest of Judgment, and therefore must be an Error appearing upon Record*; but it is said, that Error does appear upon the Face of the Record, because the Rule, which warrants the Proceeding by a special Jury, is not suggested upon Record. The Act looks upon Proceedings by special Juries, and Proceedings upon the Balloting Clause, to be equally beneficial, and was so looked upon by the Legislature. Special Juries not treated by the Act as introductive of a new Law, but leaves them to the Directions of the Court and the old Method of Proceedings in these Cases. *The Rule is no more than to direct the Officer in the Manner of returning his Writ, there is no Precedent to shew the Necessity of suggesting the Rule upon Record*; and it seems equally necessary to suggest every Rule of pleading upon Record; if a Question arises, whether a Rule or no Rule, it must be determined in its proper Court; and if no Rule, the Court will relieve the Party by setting aside the Judgment. Where an Exception is made, as in the Act of Indemnity, 12 Car. 2. 11. the Party, that will take the Benefit of the general Provision of the Act, must shew himself not to be included within the Exception, otherwise the general Provision of the Act will not extend to him. *Judge of Assise may direct a less Number than forty-eight to be returned*; and yet these Directions cannot be entred upon Record; this is a stronger Case than the Case in Question; this is drawn by Exception out of the Balloting Clause, and is giving a Power to the Judges which they had not by Common Law. *In all the Cases cited by the Defendant there is manifest Error appearing upon the Face of the Record; to plead double was Error at Common Law; and therefore unless something be suggested upon Record, as cum licentia Cur' secundum form' Stat', &c. to draw that Part of the Case out of the general Proceedings by Common Law, it still remains Error*; so where the Venire is directed to the Coroner, for the Sheriff is the legal and proper Officer to make the Return;

turn, and therefore something must appear to shew why the Venire was not directed to him. The same Reason for that Determination in *Telo*. where although the *Tales* was suggested upon Record, yet that was not thought sufficient; for there could be no Trial by *Tales* at Common Law, and therefore necessary to suggest *Nomina Jurator de novo apposit secund formam Stat.* Had the present Case been equal to any of those, the Want of Suggestion would have been Error; but the Common Law supports Trials by special Juries, and therefore the Want of the Suggestion is not Error at the Common Law; and so note a Difference, where an Act of Parliament makes an Alteration in the Common Law, and where it is made in Affirmance of it. Note; Per Page 7. Though the Court did not grant special Juries without Consent before the Act, yet the Court had a Power to grant them.

Per Cur: Judgment must be affirmed. Note; On the last Day of this Term, the Defendant being brought into Court to receive Judgment, Judgment was given against him accordingly, viz. To pay pro Fine 100 l. to suffer one Year's Imprisonment, and to give 2000 l. Security for his Good Behaviour for seven Years. Vide *Layer's* and *Haines's* Trial.

## Washer versus Smith & Ux', Term. Mich. 6 Geo. II. B. R.

**A**CTION of Assault and Battery. There were two Counts ( 39. )  
laid in the Declaration; the first was against Husband and Wife jointly, and the second was against Wife only. The Defendants, as to the *Vi & armis* in the first Count, pleaded a Plea of Not guilty; and as to the Assault, they pleaded a Justification in Defence of Property by a *Molliter manus imposuerunt*. The Feme pleaded in the same Manner to the second Count; and upon both these Issues they went to Trial. The Jury found the Defendants guilty, but gave under 40 s. Damages.

Mr. M. Counsel moved, that the Plaintiff might have his full Costs, notwithstanding the Damages were under 40 s. and laid it down for a Rule, that whenever the Defendant pleaded specially, and there was a Verdict against him, the Plaintiff always had his full Costs, and there was no Necessity for a Certificate.

Mr. F. Counsel cont: The Plaintiff is not intitled to more Costs than Damages; and insisted upon the 22 & 23 Car. 2. c. 9. which enacts, That in Trespass, Assault and Battery, and other Personal Action, if the Judge do not certify upon the Back of the Record, that the Assault and Battery was sufficiently

B b

proved,



proved, or that the Title of the Land mentioned in the Plaintiff's Declaration was chiefly in Question, the Plaintiff, in case the Jury shall find the Damages to be under 40 s. shall recover no more Costs than Damages. Here is no Certificate that the Battery was fully proved, and nothing to distinguish it from the common Case, where Not guilty is pleaded. Where the Defendant pleads Son Assault, he confesses the Battery, and therefore no Occasion for a Certificate; but here the Battery is denied, and the special Pleadings go only to the Assault. Supposing the Defendants had pleaded generally Not guilty, and the Plaintiff had proved that they *Molliter Manus imposuerunt*, without any Thing further, would the Judge have certified it in this Case? there is no more Reason to give Costs, because the Defendants have pleaded specially, than there would have been had the general Issue only been pleaded.

L. J. An odd Doctrine, that when the Defendant pleads specially in these Cases, the Plaintiff must have full Costs; indeed when Son Assault is pleaded, the Battery is admitted in express Terms, and amounts to a Certificate; but *Molliter manus imposuit* goes only to the Assault, and the Defendants as to the Battery have pleaded Not guilty.

Cur: The single Question is, Whether *Molliter manus imposuit* does not admit a Battery? *Adjornatur*.

### Martin ver. Allthom, Mich. 6 Geo. II. B. R.

( 40. ) **A**CTION upon a promissory Note which was given and wrote by the Defendant himself, who was an Attorney, and in the Note the Plaintiff was named *Marten* with an e, but the Plaintiff in the Declaration named himself *Martin*; and this the Defendant pleaded in Abatement, viz. that the Plaintiff's Name was *Martin*, whereas the Note was given to one *Marten*.

On a frivolous Plea, the Defendant being an Attorney ordered to attend.

Mr. T. Counsel moved to set aside the Plea with Costs, and the Plaintiff might be at Liberty to sign Judgment as if no Plea had been put in. The Court held the Plea to be frivolous, and reproved the Counsel for setting his Name to a sham Plea, and made a Rule to discharge the Plea; and that the Defendant, being an Attorney, should attend.

Hoar *versus* Gates, Mich. 6 Geo. II.  
B. R. *Vide ante* Case 32. & *post*  
Hil. 7 Geo. II.

THIS Case was again argued, and for the Plaintiff (41.) insisted, that the Rejoinder was bad; for a Bill of *Middlesex* cannot be supposed to issue but in Term-time; besides, it is Matter of Record, and the Parties cannot aver contrary to that. *Lutw.* 232. 1 *Sid.* 53, 60. *Stiles* 156. It is in the Nature of an Original. *Carth.* 232. 2 *Show.* 253. 4 *Mod.* 9. *Cro. Car.* 264. 1 *Roll. Abr.* 893. 1 *Mod.* 158. *Cro. Eliz.* 181. *Carter* 227. *Hob.* 156, 297. Where the Party is not estopped by the Record to aver the very Time of the Purchase of the Writ.

Mr. R. Counsel *cont'*: The Rejoinder in this Case is only an Answer to the Plaintiff's Replication, which goes to Matter of Fact only, *viz.* that he prosecuted his Bill of *Middlesex*, Hil. 13 Geo. 1. returnable the Term following. To this the Defendant rejoins what is Matter of Fact also, *viz.* that *in rei veritate* the Plaintiff did not prosecute his Bill in Hil. but that it issued afterwards, and not till the 30th of March; which being Matter of Fact only, is confessed by the Demurrer. The Cases that have been cited are all of them Cases upon *Latitats* which bear *Teste*, and that it is which makes the Estoppel, for the Record is against him; but in the Bill of *Middlesex* there is no *Teste*, which makes a great Difference. Supposing upon a *Latitat* the *Teste* should be omitted, the Court would take no Notice of it by Way of Estoppel, but it may be averred against. The Case in *Lutw.* is not to the Purpose, for there the *Teste* appeared upon Record. Supposing a Man should be arrested in Vacation, without any Writ being sued out, and afterwards the Plaintiff should take out a Writ, pretending that it issued out the Term preceding, is the Defendant estopped to aver *in rei veritate* when the Writ issued? *Vide* 2 *Keb.* 173, 198. 3 *Keb.* 213. When the Statute of Limitations hath given a Man a legal Advantage, tho' it is a hard Case, yet this Method shall not avoid it.

*Cur'*: The Bill of *Middlesex* is the Award of the Court, but the Party is not concluded by that Award. The Statute of Limitations is a remedial Law, and made to preserve Peace and Quietness, that People must either prosecute their Actions in Time or not at all; it was the Plaintiff's Fault he did not take out his Bill sooner. There is a strong Case in *Raym.* 161. the Case of *Bilton versus Johnson*, which will



go a great Way in determining this Point. *Vide* the Case; where it is held, that tho' the *Teste* of a *Latitat* is upon Record, and the Party cannot aver against it, yet there would be great Inconvenience, if he could not set out the very Time of the Purchase of the Writ; and the Relation of the *Teste* is only to prevent Fraud, and not justify a Tort. The Court further held, that the Plaintiff in this Case had no Remedy for his Debt, by Reason of the Statute of Limitations, unless given him by this Fiction in Law; and it would not be right for the Court to give Remedy by Fiction, where it is expressly prohibited by the Statute. *Adjournatur*.

Pitman *ver.* Hardy, Mich. 6 Geo. II.  
B. R.

( 42. )  
Debt brought  
on a War-  
rant of At-  
torney to  
confess Judg-  
ment.

THE Defendant gave a Warrant of Attorney to confess a Judgment, *Pasch.* 5 Geo. 2. but Judgment was not entered up that Term; afterwards the Plaintiff brought an Action of Debt, and declared upon this Warrant of Attorney; to which the Defendant demurred. Mr. G. Counsel insisted, that the Defendant, by his Warrant of Attorney, had confessed the Debt.

The Court said, they never heard of an Action being brought upon a Warrant of Attorney; that the Judgment not being entered within the Time limited, the Authority was determined; nor can the Warrant of Attorney be any Acknowledgment of a Debt; and so Judgment for the Defendant per totam Cur'.

Wilkinson *versus* Draper, Mich.  
6 Geo. II. B. R.

( 43. )  
Verdict set  
aside, because  
the Plead-  
ings which  
were special,  
were not en-  
tered with the  
Clerk of the  
Papera.

MR. F. Counsel moved to set aside a Verdict, because there was a special Plea and Replication, and no Entry was made thereof with the Clerk of the Papers, which is irregular and contrary to Practice. Mr. S. Counsel: The Defendant should have objected to this in proper Time, but after Verdict it is too late to take Advantage of it.

But the Court said they would not suffer the Officer to be cheated of his Fees; and so set aside the Verdict, and obliged the Parties to go back to the first Fault.

Daniel ver. Purbeck, Mich. 6 Geo. II.

B. R.

MR. S. Counsel: *It is an established Rule in this Court, ( 44. )*  
*that where Notice of Trial is countermanded, the Coun-* Costs for not  
*termand to save Costs must be two Days before, &c. in a Town-* Counter-  
*Cause, and four Days in a Country Cause. Notice of Trial* manding a  
*was given in this Case for the 19th of August at Warwick, Notice of*  
*and no Countermand till the Sixteenth; he therefore moved,* Trial in  
*that the Defendant might have his Costs; there is no Respect Time.*  
*to be paid to the Circumstances of the Case, but the Rule*  
*is general, and must be pursued; and the Court ordered ac-*  
*cordingly, that the Defendant should have Costs.*

Daniel versus Purkis, Mich. 6 Geo. II.

B. R.

ACTION by the Plaintiff, who was an Attorney, for his ( 45. )  
 Fees; pending which the Parties came to an Agree- Motion  
 ment, that, upon Payment of so much Money by the Defen- for a new  
 dant, Proceedings should be stayed. The Defendant paid the Writ of In-  
 Money, and took a Discharge from the Plaintiff; notwith- quiry, the  
 standing which the Plaintiff afterwards proceeded to Judgment, Jury having  
 and gave the Defendant Notice of executing a Writ of In- found Da-  
 quiry; a Writ of Inquiry was executed accordingly, and the mages for  
 Jury, upon the Circumstances of the Case, gave one Penny the Defen-  
 Damages for the Defendant. dant.

Mr. P. Counsel moved for a new Writ of Inquiry; upon  
 Issue joined the Jury may find for the Plaintiff or Defendant,  
 at their Discretion; but after Judgment they are only to in-  
 quire into the Quantum of the Damages the Plaintiff has  
 sustained; and cannot give Damages against him; and  
 of this Opinion was the Court, and therefore thought a new  
 Writ ought to go.

Mr. S. Counsel cont: *It must be upon the common Terms*  
*then, upon Payment of Costs.*

Mr. P. Counsel cited the Case of the Earl of Roehford  
 and the Bishop of Norwich in the C. P. A Quare Impedit was  
 brought, and Judgment by Default, and upon executing a  
 Writ of Inquiry, the Jury found there was no such Church;  
 and upon that Application was made to the Court, who  
 granted a new Writ without Payment of Costs.

C c

Mr.



Mr. S. Counsel: The Reason is, because no Costs are given upon a *Quare Impedit*. It is the constant Practice to pay Costs upon Motions of this Nature; if the Plaintiff will waive his Judgment, we will waive our Costs, and plead the General Issue. *But the Plaintiff not consenting, the Court enlarged the Rule.*

**The King versus Anne, Ux' of Hannibal Cartor, Mich. 6 Geo. II. B. R.**

( 46. )

One committed as a loose, idle disorderly Person, till she find Security, bailed on a *Habeas Corpus*.

**T**HE Defendant, being a Negro Slave, was carried by her Master before a Justice of Peace, who committed her to *Bridewell* as a loose, idle disorderly Person, and for Insulting and Abusing her Master. It was further set forth, that she was committed for Want of Sureties; and Directions to the Gaoler to keep her till she found good and sufficient Bail; she was now brought down by *Habeas Corpus*, and Mr. K. Counsel moved to have her discharged; the Commitment is by one Justice of Peace only, and is not a *Conviction* upon the Act of Parliament, like *Mary Talbot's Case*; for there she ought to have been sent to the County-Gaol. She is committed as a loose, idle disorderly Person, for Insulting and Abusing her Master; if the Court is of Opinion that the Commitment is legal, we have got good Bail for Sureties.

Mr. R. Counsel *con'*: The Insulting and Abusing her Master is an Offence bailable; *but being committed likewise as a loose, idle disorderly Person, she is not bailable.*

*Cur'*: By the Commitment the Gaoler is charged to keep her in Custody only till she find Security. There is no certain Time limited in the Commitment how long she shall remain a Prisoner, as till the next Sessions, &c. and so by this Means she may remain a Prisoner for Life.

M. R. Counsel then offered to prove her a Slave, and that the Master might keep her a Prisoner, if he pleased; but the Court would not suffer him to enter upon that Point. She is committed for Want of Sureties, and must be bailed if she hath got any. There was an Affidavit read that she was married to a Freeman.

**Berrington versus Parkhurst, Mich. 6 Geo. II. B. R. Vide post Case 49.**

( 47. )

Amendment of Issue in Ejectment.

**M**R. R. and Mr. F. moved to shew Cause. *This is a Rule to amend a Declaration in Ejectment, by altering the County and laying the Demise in Bucks, whereas*

now it is for Tithes in Middlesex. 'This Amendment goes to the very Substance and Jett of the Action, and the Defendants have pleaded to the Demise, as laid in the Declaration. There is a Difference between Actions in Ejectment and all other Cases; and the Court will never suffer the Plaintiff in Ejectment to amend his Declaration.

Mr. A. Counsel *cont'*: 'The Court have frequently suffered the Plaintiff to amend his Declaration, where the Mistakes have been more material. In Assumpsit by the Executors of the Duke of Marlborough, the Court gave the Plaintiffs Leave to amend, by laying the Assumpsit as a Promise made to them, whereas before it was laid as a Promise made to the Duke himself. So where the Word Felonice hath been omitted, the Court have given Leave to amend after Issue joined, and the Cause been actually carried down to Trial. Ejectments are the Creatures of the Court, and therefore may take greater Liberties in rectifying these Mistakes. In this Case the Declaration which was delivered in the County is right, it is the Declaration in the Copy of the Issue which is wrong.

Cur': We never suffer Declarations in Ejectment to be amended where it alters the Substance of the Action; but if the Declaration delivered in the County is right, the Copy of the Issue may be amended by it; but here the Rule is only to amend the Declaration, and you cannot amend the Copy of the Issue by this Rule; and therefore the Rule must be discharged.

### The King versus Inhabitants of Eccleshorne, Mich. 6 Geo. II. B. R.

MR. P. for a Certiorari to remove an Order of the Justices relating to the Repairs of the Highway, and obtained a Rule to shew Cause. Mr. L. There is no Act which prescribes a Method for the Repair of the Ways but the 3 & 4 W. & M. by that Statute, no Certiorari lies, unless the Right come in Question; by 7 & 8 W. when a Township is not able to repair the Ways, if the Inhabitants will contribute 6 d. per Pound, the Parish is to repair; but how? by the Method prescribed by 3 & 4 W. (48.) Highways.

Cur': How can the Justices make an Order to repair, and how can they make a Rate but by 3 & 4 W.? Rule discharged.



Berrington *versus* Parkhurst, Mich.  
6 Geo. II. B.R. *Vide ante* Case 47.

( 49. )  
Issue in E-  
judgment a-  
mended by  
the Declara-  
tion.

MR. A. now moved again to mend the Copy of the Issue by the Declaration delivered, by changing the County from *Middlesex* to *Bucks*, which was granted by the Court; but they refused to let the Plaintiff strike out *Tenementa prædicta*, and insert *dimissa præmissa* instead of them, or to let him strike out the 5 s. Rent.

Lance *versus* Draper, Term. Hil.  
6 Geo. II. 1732. B. R.

( 50. )  
Motion to  
quash a *Testa-  
tum Ca' Sa'*  
for a Vari-  
ance be-  
tween the  
Writ and  
Record.

PLaintiff had Judgment to recover his Debt and 5 l. *pro Dam' & Custagiis*. The Defendant brought Error; and Judgment being affirmed, the Plaintiff had 12 l. for his Costs allowed him upon the Writ of Error. Whereupon he took out a *Cap' ad satisfaciendum* to levy the Debt and Costs upon the original Judgment, *acetiā* the 12 l. Costs upon the Writ of Error. The Plaintiff afterwards took out a *Testatum Ca' Sa'* to levy the Debt and Costs recovered below, but took no Notice of the Costs upon the Writ of Error.

Mr. R. Counsel moved to quash the *Testatum Ca' Sa'* for this Variance.

Mr. S. *cont'*: Here is no Variance, but the *Testatum* is agreeable to the original Record; before the Statute for Amendment of Writs of Error, where the Writ contained more than the original Record, that was always held to be a material Variance; but where the Writ contained less, as where Judgment was against *A.* of *B.* in the County of *Gr.* and a Writ of Error had been brought to reverse the Judgment against *A.* without mentioning the Addition, yet the Writ was always held sufficient; and the Reason is, because it is agreeable to the original Record; and tho' it is not set out in so full a Manner as it might be, yet there is sufficient to make it answer the original Record.

But the Court took Time to consider.

Kent & Ux' *versus* Wright, Hil.  
6 Geo. II. B. R.

THE Defendant and another were jointly and severally bound in a Bond of 200*l.* conditioned to pay 100*l.* at a Day certain; but it was further provided, that if the other Obligor became insolvent, that then the Defendant, upon Payment of 50*l.* at the Day, should be discharged of the Bond. The Plaintiff brought his Action upon this Bond against the Defendant, who paid 50*l.* into Court, and then pleaded a Tender, and that the other Obligor was become insolvent; the Plaintiff took the 50*l.* out of Court, and then demurred to the Defendant's Plea, in order to have his Damages and Costs; whereupon the Defendant moved the Court to stay Proceedings. ( 51. ) Bond conditional.

Mr. T. Counsel for the Plaintiff insisted, that the Tender was not well pleaded; for that it did not appear when the other Obligor became insolvent; and if he did not become so till after the Day of Payment, then the Condition was broke, and the whole Penalty forfeited; and cited 2 Cro. 594.

Mr. S. Counsel *con*: The Defendant must go before the Master to see what Damages accrued before the Money was paid into Court. The Plaintiff insists, that the Tender is not well pleaded; *but he has waived that by taking the 50*l.* out of Court*, so that nothing is now to be considered but the Costs and Damages.

*Cur*: The Condition of the Insolvency must have Reference to the Day of Payment; but if the Insolvency happened after that, the whole is forfeited; it does not appear by this Plea when the Insolvency happened, but the Plaintiff has waived this by accepting the 50*l.* and so referred it to the Master, to see what was due for Costs and Damages before the 50*l.* was brought into Court.

Musgrave *ver.* Povee, Hil. 6 Geo. II.  
B. R. *Vide post* Case 54.

THE Defendant was libelled against in the Bishop of Ely's Court, for calling the Plaintiff *Rogue and Rascal*. Prohibition to a Libel in the Spiritual Court for Words.  
Mr. F. Counsel moved for a Prohibition, and suggested that these were Words only of Heat and Passion, and occasioned  
D d



sioned by the Plaintiff's giving ill Language first, and calling the Defendant a Lyar. These Words are not punishable in the Spiritual Court. To shew Cause.

## Crips versus Lander, Hil. 6 Geo. II. B. R.

( 53. )  
Error.

**M**R. M. Counsel for the Plaintiff, in Error. *Assumpsit* against the Defendant an Attorney in C. B. by Bill, Hil. 5 Geo. 2. and an Imparlanee to a Day certain in Easter Term; Judgment for the Plaintiff by Default, and a Writ of Inquiry taken out returnable *Cras Ascens Dom*, which is the last general Return in Easter Term, and thereupon final Judgment. And the Error insisted upon was, that Bills in C. B. are of the same Nature with Bills in this Court, and that all Process issued out in Consequence thereof ought to be made returnable at a Day certain. That this Error is a Misaward of Process, and not amendable within any of the Acts of *Jeofails*, which extend only to Judgments after Verdict.

S. Counsel: This is a *Discontinuance*, and aided by 32 H. 8. which aids Discontinuances after Verdict only; but the late Act for Amendment of the Law extends to Judgments by Default, and brings them within the Remedy of that Statute; and the Case of *Leppor and Hobbs* was cited by Mr. Draper (*amicus Cur*) which Case was in *Pasch. 3 Geo. 2. Action against the Defendant an Attorney in C. B. by Bill, and Judgment by Default; the Plaintiff took out a Writ of Inquiry, returnable at the General Return; Error was brought in this Court, and held to be within the Statute of Jeofails.*

### The same Cause argued again.

Mr. S. Counsel now spoke to this Cause again, and said it was nothing but a Miscontinuance aided by 32 Hen. 8. and cited the Case of the King and the Bishop of Meath in Ireland; which was a *Quare Impedit* returnable at a Day certain, but the Return in the *Venue* was made upon the general Return-Day, and a Writ of Error being brought in this Court, *Pasch. 3 Geo. 1.* this was assigned for Error; and after it had been spoke to several Times by the Counsel at the Bar, Parker C. J. in *Trin. 3 Geo. 1.* delivered the Opinion of the Court in Confirmation of the Judgment; that this was amendable by the Statute, being only a Miscontinuance

nuance of the Process, and cited 1 Inst. 325. a. the Difference between a Discontinuance and a Miscontinuance. A Discontinuance in Process consisting in not doing where a Process is not continued; and a Miscontinuance is when one Process is awarded instead of another, or when a Day is given which is not legal. It was likewise held, that this Statute extended to Civil Causes at the Suit of the Crown. As to the Case of *Lepper and Hobbs* he said, he had looked into it, but it was entered with an *Adjournatur* only, and not determined. The Court held the first Case to be in Point; and that there was no Difference, only in the present Case the Jury appear upon a Writ of Inquiry, and there they were returned by *Venire*; and so Judgment was affirmed *per Cur*. And it was adjudged afterwards in *Easter Term* following, *inter Burrows versus Dogley*.

**Mufgrave ver. Povee, Hil. 6 Geo. II.**  
*B. R. Vide ante Case 52.*

**M**R. F. Counsel moved to shew Cause, &c. These Words being spoken by one Clergyman against another, are Words of Scandal and Detraction, and properly within the Cognisance of the Spiritual Court, and cited 2 Roll. Abr. 295. pl. 8. 297. 2 Lutw. 1053, 1054, 1055. 3 Lev. 17.

Mr. F. Counsel cont: These are only Words of Heat and Passion, and in no wise reflecting upon his Function; and cited Comb. 253. 2 Show. 454.

*Cur*: In the sixth of the late Queen this Distinction was taken upon Motion of the like Nature. Where the Words in themselves import a Reflection upon the Profession or Business of another Person, and where they are general, and have no Tendency to any particular Function, as in the present Case; *Rogue* and *Rascal* are general Words, and do not in the least relate to the Function of a Clergyman; and therefore made the Rule absolute for the Prohibition.

**The King ver. Moor, Hil. 6 Geo. II.**  
*B. R.*

**I**ndictment for Perjury removed by Certiorari into this Court; the Defendant carried down the Record, and gave Notice of Trial, but not being ready with the Evidence he never entered the Record, and therefore was obliged to pay the

( 54. )

Prohibition.

or habeas  
corpus  
ad id  
motum

( 55. )

Perjury.  
Motion to  
quash the  
Indictment.



*the Prosecutor Costs. And now in this Term, Mr. S. Counsel moved in Behalf of the Prosecutor to quash the Indictment.*

*Mr. F. Counsel cont': The Prosecutor is now too late; the Defendant has pleaded, and the Parties are at Issue. If the Indictment is now quashed, it must be upon Payment of the Defendant's Costs; and of this Opinion was the Court. And because the Prosecutor would not agree to pay Costs, the Court refused to quash the Indictment.*

### Harcourt *versus* Seagrave, Pasch. 6 Geo. II. B. R.

( 56. )  
Special Demurrer waived, and Nil debet pleaded to Debt on a Judgment.

**A***CTION of Debt upon a Judgment; Defendant demurred specially, and there was a Joinder in Demurrer; but before the Time for Pleading was out, the Defendant struck his Demurrer out of the Paper, and pleaded Nil debet per Patriam.*

*Mr. B. Counsel to set aside this Plea. Whenever the Defendant demurs specially, and afterwards waives his Demurrer, he can plead nothing but the General Issue; but Nil debet is no Plea to an Action of Debt upon a Judgment.*

Refused to be set aside on Motion.

*Sed per Cur': In all Cases where a Plea in Bar is pleaded, we never suppress it upon Motion; Nil debet is a general Issue; and tho' it may not be a proper Plea in this Case, yet it is a Plea in Bar, and so falls within the general Rule; if the Plea is ill the Plaintiff may demur.*

### Hil. *versus* Sir Thomas Reynolds, Pasch. 6 Geo. II. B. R.

( 57. )  
Demurrer. Motion to set it aside.

**U***PON Motion to set aside a Demurrer, the Case was this: Action upon several Covenants; the Defendant, without craving Oyer of the Indentures, set forth Indentures of Covenant in his Plea, and then demurred generally to the Declaration; but the Court set aside the Demurrer; because the Defendant cannot set forth any Deed, &c. without craving Oyer.*

*Sed Quære. For tho' the Party demanding is not bound to plead without it, yet he may plead without it, if he will, on taking upon himself to recover the Bond or Deed; tho' if he plead without Oyer, he cannot after waive his Plea and demand Oyer. Mo. Ca. 28. 3 Salk. 199. and in Wymark's Case, 5 Rep. 74. A Defendant pleaded a Deed without a Prof,*

*&c.*

Ec. the Plaintiff confessed a Deed, but without Oyer shewed the Condition, and assigned a Breach; and held good.

Heron *ver.* Bushell; Pasch. 6 Geo. II.

B. R.

**A**CTION in the Palace-Court; the Defendant being a married Woman pleaded Coverture, but the Plea being over-ruled Judgment was given against her. A Writ of Error was brought in B. R. and general Errors assigned, and upon that Judgment affirmed. Defendant then brought Error coram vobis, intending to assign Error in Law; and thereupon the Plaintiff moved to have Execution; for after Judgment affirmed a Writ of Error coram vobis will not lie; but in Support of this Writ was cited the Case of *Tompson and Lyon*, Pasch. 4 Geo. 2. In an Action in the Marshalsea-Court, the Defendant gave Coverture in Evidence, notwithstanding which Judgment was given against her; whereupon she brought Error in this Court, and Judgment was affirmed; she afterwards brought Error coram vobis, and assigned for Error that she was a Feme Covert, and the Court allowed this for Error in Fact, and reversed the Judgment. But the Court afterwards in the present Case granted the Motion, and held, that Error coram vobis will not lie after Affirmance of Judgment; for this Writ shall not be allowed but at the Discretion of the Court; and L. J. cited 1 Ventr. 31. Vido Cro. El. 281. Error coram vobis.

( 28 )  
to broas.  
( 38. )  
of writs  
Error coram  
vobis will not  
lie after Af-  
firmance.

Charlton *versus* Bankcroft, Pasch.  
6 Geo. II.

**A**FTER Judgment in B. R. the Parties entered into an Agreement not to bring Error in Parliament, notwithstanding which the Defendant brought Error, &c. upon this the Plaintiff applied to the Court to quash it, and had a Rule accordingly; upon which he immediately took out Execution; and the Court being now moved to set aside this Execution, it was insisted upon, and so ruled by the Court, that the Rule was no Supersedeas to the Writ of Error; if the Defendant refused to obey the Rule, the Plaintiff might have had an Attachment; but while the Writ was in Being the Plaintiff could not sue out Execution.

( 39. )  
Error.



Darby *versus* Gold, Pasch. 6 Geo. II.

B. R.

( 60. )  
Record of  
Nisi prius  
lost.  
Motion to  
make a new  
one.

**A**CTION of Debt upon a Bond, and a Verdict for the Plaintiff; but the Record of Nisi prius being lost, Mr. F. Counsel moved for Leave to make a new Record, and cited the Case of Harvey and James, 1 Vent. 92, 93. and said, there were several other Cases to this Purpose; and upon this a Rule was made accordingly.

In the Case of Needham and Granger, 9 Geo. 1. the Distingas being lost a new Writ was granted per Cur, returnable by the Sheriff of Bristol.

Jurants *ver.* Williams, Pasch. 6 Geo. II.

B. R.

( 61. )  
Error.

**E**RROR upon a Judgment in C.B. upon an Action brought by an Attorney of that Court by Bill against the Defendant Executor, &c. for his Fees and Business solicited for his Testator; and the Declaration set forth, that the Defendant being indebted to him in the Sum of 6 l. for Business done and performed, &c. he in Consideration inde promised to pay him 60 l. Defendant pleaded several Judgments had against him as an Executor, and that he had not Assets ultra to satisfy the Plaintiff's Demands. The Plaintiff confessed the Defendant's Plea, and entred Judgment with Prayer of Execution of Assets quando acciderent; and a Writ of Error being brought upon this Judgment, Mr. M. Counsel took two Exceptions, first, That this being an Action upon several Promises, the Consideration must be mutual, or otherwise the Action will not lie; and the Sum of 6 l. is not sufficient to raise a Consideration for the Payment of 60 l. His second Objection was, that the Proceedings being by Bill, the Defendant in his Plea ought to have concluded *no Assets die impetrationis Bille*, and not as he has done in this Case, that he had no Assets *die impetrationis Brevis originalis*.

Mr. D. Counsel *con'*: As to the first Objection he said, the *Sexagint' Libras*, mentioned in the Consideration, was only Surplusage, and the Declaration is well enough without it; for it is said in the Consideration *inde* he promised to pay *prædict' Sexagint' Libras*; so that if the *Sexagint'* be omitted, the *prædict' libras* is good. To the second Objection he said, if

if the Defendant's Plea is naught, Judgment must be for the Plaintiff in either Court, for the Defendant cannot take Advantage of his own Error; and the Judgment was affirmed per Cur'. Vide 1 Latw. 445. Cro. El. 647. Palm. 74. Savil 71. Sexagint' rejected as Surplusage. Cro. El. 747. pl. 28. the Sum of 10l. sufficient to raise a Consideration for Payment of 100l.

## King versus Horwell, Pasch. 6 Geo. II.

B. R.

**M**R. R. Counsel, to quash a Certiorari, which was granted ( 62. )  
to remove several Orders of Justices of the Peace, that *Certiorari.*  
were made at the General Sessions for the Repair of Highways, according to a Power granted to them by the 3 & 4 W. & M. c. 12. by Virtue of which Statute, the Justices may in Sessions order an Assessment to be made to repair the Highways, &c. provided such Assessment does not exceed 6d. in the Pound; and it is further enacted by the same Statute, that all Matters concerning Highways, &c. shall be determined in the County where the same do lie, and not elsewhere; and that no Presentment, Indictment or Order, made by Virtue of this Act shall be removed by Certiorari out of the said County into any other Court. Per Cur': A Rule to shew Cause.

## Goodtitle ver. Pettoe, Pasch. 6 Geo. II.

B. R.

**I**N Ejectment the Case was thus: Birk being seised of Lands ( 63. )  
in Fee covenanted, (out of the natural Love and Affection *Ejectment.*  
which he had for his Wife Anne, and for her better Provision and Maintenance after his Decease,) to stand seised to the Use of himself and Anne his Wife during their Lives, and the Life of the Survivor of them; and after his Decease, and the Decease of the Survivor of them, then to the Issue of their two Bodies lawfully to be begotten; and for Default of such Issue, Remainder to his Wife for Life, with a Power to limit over the Estate to such Persons, and to such Uses, as she should appoint; and for Want of such Appointment, Remainder to William Thornton the Lessor of the Plaintiff in Fee. Birk died without Issue; Anne entred; and by Lease and Release conveyed the Lands in Question to her Sister Jane Smallpiece in Fee, who made a Lease of the Premises in Question



Question to the Defendant. *Anne* dies; after whose Death *William Thornton* enters; upon whom *Pettoe* the Lessee of *Jane Small-piece* re-enters, upon which the Ejectment is brought. And this Matter being made a Case for the Determination of this Court, Mr. R. Counsel argued for the Plaintiff, and Mr. F. for the Defendant.

Mr. R. the Doubt in Question depends upon these two Points, viz. what passed by the Lease and Release to *Jane Smallpiece*; and if it should be adjudged that nothing passed by that Conveyance, then 2dly, whether the Limitation of the Use to *William Thornton* was a good Limitation to raise a Use to him or no. As to the first Point, whether a Use is raised by Fine or Feoffment, there is no Occasion for any Consideration; because the Uses are raised out of the Estate of the Trustees, in whom the whole Fee-simple is vested; but in all Cases upon Covenants to stand seised, the Use arises out of the Estate of the Covenantor, in whom the Fee remains till the contingent Use arise; and therefore there must be a Consideration, otherwise no Use can arise upon such Limitations. 2 Sid. 66. Natural Love and Affection is a good Consideration by Reason of Proximity of Blood; so the Love and Affection which a Man bears towards his Wife, is a good Consideration; but where there wants Priority of Blood, or a valuable Consideration in Money, there the Limitation is absolutely void. In this Case therefore the Limitation of the Use to the Wife is a good Limitation, there appearing a sufficient Consideration upon the Face of the Deed itself to raise a Use to her; she takes an express Estate for Life; but what makes the Doubt in this Case is, the Power which is given to the Wife of limiting over the Estate to such Persons, and to such Uses, as she shall appoint; so that here is no *Cestui que Use* named in certain, neither can any Consideration be intended in Blood; if *Jane Smallpiece* hath any Title, she must claim by the first Covenantor; but she cannot claim under him, because she is a Stranger to the Covenantor, and likewise there is no Consideration; supposing the Covenantor had covenanted out of Love, &c. to his Wife, to stand seised to the Use of his Wife for Life, Remainder to *Anne Smallpiece*; in this Case no Use could arise to *Anne Smallpiece*; for there is no Consideration either express or implied, and being altogether a Stranger in Blood, she cannot claim under the first Covenant. Nor can any Consideration be averred in this Case, because the Appointee, at the Time of raising the Use, was uncertain; and this agrees with *Mildmay's Case*. Where Uses are raised by Covenant in Consideration of paternal Love, &c. or for the Advancement of any of his Blood, and after in the same Covenant a Proviso is added, that the

the Covenantor, for divers good Considerations, may make Leases for Years to his Sons or Daughters, or any other of his Blood; yet the Covenantor in such Case cannot make Leases to his Sons, &c. much less to any other Person; because the Power to make Leases for Years was void when the Indenture was sealed and delivered; for the Covenant upon such general Consideration cannot raise an Use; and no particular Averment can be made, because his Intent was as general as the Consideration was; and his Intent at the Time of the Delivery of the Deed was not to make a Lease to any Person in certain, but a Demise generally to whom he pleased; and therefore the Power to make Leases, the Uses being created and raised by Covenant upon the Consideration aforesaid, were void *ab initio*; and no Averment can make it good, or reduce it to any Certainty, for the Intent of the Covenantor is as general as the Words are. 1 Rep. 176. b. As to the second Point, viz. Whether there appears sufficient Matter upon the Face of the Deed to raise a Use to William Thornton, he argued, a good Use would arise to William Thornton. If a Man covenants for divers good Causes and Considerations to stand seised to the Use of John a Stiles, tho' J. S. is not mentioned to be of his Blood, yet the Relation he bears to the Covenantor may be averred; in this Case there is no Question but if William Thornton had been mentioned to be the Sister's Son, but then a good Use would have arisen to him upon that Covenant; and the Consideration of Love, &c. might have been averred, as is adjudged in Mildmay's Case, 1 Rep. 176. b. 177. a.

It is the Intent of the Covenantor not only to provide for his Wife, but his Intent is likewise to provide for William Thornton who was his Sister's Son; if Love and Affection to his Wife had been omitted, yet all Uses in Remainder to Relations and the next of Kin had been good; nor can the Consideration of Love, &c. to his Wife, mentioned and expressed in the first Limitation, destroy these subsequent Uses; for a Consideration, when it is not inconsistent with the Deed, may be averred; tho' a Consideration be expressly mentioned in the first Limitation; and so is Bedel's Case, 7 Rep. 40. Harpur's Case, 11 Rep. 24. b. 25. a. where it is also resolved, that altho' she be not mentioned to be his Wife, yet an Averment may be made to that Purpose; so if a Man covenants to stand seised to the Use of J. B. without mentioning him particularly to be his Son, yet J. B. may be averred to be his Son.

Mr. F. cont: He agreed, that the two Points were the proper Points in Question; in this Case, the Power which is given to the Feme of limiting over, &c. depends upon the first Consideration, and the Uses which fall within that Consideration



tion will be good; the Reason of Mildmay's Case is, because the Uses arising from the Power reserved to the Covenantor do not fall within the Consideration mentioned in the Covenant; it is admitted, that if the Estate had been limited to Anne in Fee, that in that Case the Lease and Release to her Sister Jane Smallpiece would have been good; the Limitation, as it now stands, falls strongly within that Reason, only the Method in which it is now limited is more advantageous to her than if it had been actually limited in Fee; for as it now stands, if she had remarried with another Husband, she might notwithstanding her Coverture have disposed of it by Will or otherwise to her own Relations. Here is an express Power given to Anne upon Consideration of Love and Affection; which Power she hath put in Execution by making a Lease and Release to Jane Smallpiece, who does not claim as by a Conveyance from Anne, but is in by Virtue of the first Covenant; if a Man, in Consideration of Money given by B. covenants to stand seised to the Use of B. for Life, Remainder to C. in Fee, the Remainder to C. is good; and yet he is a Stranger to the Gift of the Money. 2 Roll. Abr. 784. pl. 6 & 7. But the Remainder is grounded upon the Consideration; and yet the Conveyance in that Case did not operate by Way of Bargain and Sale, but by Way of Covenants to stand seised, and the Power of limiting over; this Case is grounded upon that Consideration. Note: Since the Statute, where a Person covenants to stand seised in Consideration of Money, after the Covenant is inrolled it operates by Way of Bargain and Sale; and yet it does not take its Effect from the Inrolment, but from the first Covenants. In the Case of Knight and Tomlinson, the Testator devised Lands to one for Life, with a Power to the Devisee to limit the Estate over in Fee; and adjudged, that where a Person takes an express Estate for Life, he cannot take a greater Estate by Implication; but nevertheless the Devisee may dispose of the Estate according to the Power given him by the Testator; which Determination falls within the Reason of this Case. And yet in that Case, had the Power been general, without giving an express Estate, a Fee would have passed. 1 Salk. 239.

As to the second Point, viz. whether there appeared sufficient Consideration to raise a Use to William Thornion, he held there did not; for the Consideration must be such a Consideration as the Testator had in View; if a Man covenants to stand seised without mentioning any Consideration, there can be no Averment of a Consideration; in Mildmay's Case, where Love and Affection is expressed, the Person to whom the Use is made may aver in what Degree he stands related; as that he is Son, Brother, &c. so if the Covenant be general

neral with Consideration, and the Person and the Relation he bears the Covenantor be shewed, the Consideration may be averred; but in this Case there is no Consideration, nor does it appear in what Degree William Thornton stands related to the Covenantor; and so a Difference between this and Mildmay's Case, and therefore cannot be aided by Averment. The Statute of Frauds makes this Case much stronger; for by that Statute, all Declarations and Uses of Trusts, &c. are made void, unless proved by some Writing signed by the Party, or by his Last Will in Writing; now here appears nothing in this Writing to raise a Use; for altho' Uses are declared, yet if there does not appear sufficient Matter to create them, the Declaration is made void by that Statute; for since the Statute, no Use can be averred by Parol, but must be reduced into Writing, &c. He urged further, that the Consideration is not sufficiently found in this Case, which is now to be considered in the Nature of a *Special Verdict*; it ought to have been found certain, that the Use arises upon Consideration of Love and Affection; for in Pleading, it is not sufficient to alledge he is Son, &c. without averring the Consideration; for upon Issue joined nothing can be found upon Verdict, but that he is Son, &c. so that if no Consideration be found, none can be inferred afterwards to raise the Use.

Mr. R.'s Reply: *The Case of Knight and Tomlinson is a Case in Point, so far as it manifests that Anne took an Estate for Life.* It is expressly laid down in *Bedel's Case*, that an Averment may be made that is consistent with the Deed, provided the Person is certain; and that this Averment is traversable and issuable appears in *Mildmay's Case*, 1 Rep. 176. b. In the present Case the Person is certain, viz. to William Thornton; and had he been mentioned in the Deed as Sister's Son, without Doubt that had been a good Consideration to have raised a Use. *The Statute of Frauds doth not extend to this Case*; the Limitation is here by Deed, &c. and the Averment is only to make and explain the Consideration available; but it does not extend to create the Uses, but is only to make the Consideration sufficient to support the Uses which are declared by the Covenants to stand seised, and reduced into Writing according to the Statute.

Raymond C. J. *Under whom does Jane Smallpiece, to whom the Lease and Release was made, claim, and how does that Conveyance to her operate? It arises out of the Estate limited by the Husband, and she being a Stranger in Blood to him, and there having been no Consideration of Money made to him, the Lease and Release is void; for she does not claim by that only, but by Virtue of the first Cove-*  
nant;



*nant*; Averments in these Cases are not altered by the Statute, nor does the Act extend to them. The Intent of the Covenant is plain; but the Question in this Case is, how the Use will arise, and whether the Consideration is made good by Averment.

P. J. No Part of the Consideration can extend to the Lessor; for *natural Love and Affection to the Wife cannot be extended to the Nephew*; neither can the Intent of the Covenantor make the Uses good, for there must be a Consideration, or the Limitation is void; and the Intent can go no further than appears upon the naked Limitation of the Uses themselves.

P. J. *This Case will deserve Consideration.* If Jane Smallpiece hath any Estate, she must claim it from the Covenantor. But she can claim no Estate from him, because there is neither Privy in Blood, nor Consideration in Money; and in all Covenants to stand seised there must be a Consideration, or the Limitation is void. When a Consideration is once expressed, it will extend to all to whom a Use is limited; provided the Persons are certain, and mentioned by Name within the Deed. The finding helps the Plaintiff in this Case; he is found to be the Sister's Son, which is as strong as if he had been so named in the Deed.

L. J. The Defendant can have no Title in this Case; for the Person who conveyed to her had but an Estate for Life, and no Fee; if therefore the Defendant hath any Title, it must arise out of the Estate of the first Covenantor; but it cannot arise out of his Estate, because no Privy in Blood, nor other valuable Consideration. As to the second Point, there arises some Difficulty, tho' upon the Equity of those Cases which have been cited, the Plaintiff seems to have good Title. Wherever in a Deed the Considerations are general, an Averment which is consistent with the Deed may be made; so where the Consideration is particular, as if a Man covenants out of Love, &c. to his eldest Son to stand seised, &c. Remainder to his second Son, notwithstanding the Consideration is particular, and restrained to the eldest Son, yet it may be extended to an Averment to relate to the second Son; but there he is expressed to be his Son, which is an Explanation of the Consideration upon which the first Use arises. In this Case, here is no Explanation, and yet he said he was inclinable to think it aided by the Averment. The Statute of Frauds is not in Question, nor of any Force in this Case; for when the Use is created by Deed, the Consideration may be averred, as Payment of Money, &c. Sed adjournatur, in order for a second Argument.

Upon the second Argument, Raymond C. J. delivered the Opinion of the Court as follows, viz.

That the Remainder to the Wife, with a Power to limit over the Estate to such Person or Persons as she should appoint, was a void Limitation, and consequently her Conveyance to Anne Smallpiece by Lease and Release was a void Conveyance, and therefore the Defendant can have no Title. 2dly, That the Remainder to William Thornton was good; for here is a Cestuique Use named in certain, and he is found by the Verdict to be Nephew to the Covenantor; and according to the Resolutions in 1 Rep. 176. b. 177. a. Mildmay's Case. 7 Rep. 40. Bedel's Case. 11 Rep. 24, 25. Harpur's Case. The Consideration may in this Case be averred; and therefore Judgment was given for the Plaintiff per totam Cur.

Gale ver. Mottram, Pasch. 6 Geo. II.  
B. R. Vide post Case 103.

IN an Action upon an Arbitration Bond the Defendant (64.) pleaded no Award. The Plaintiff in his Replication set forth an Award, and assigned a Breach; whereupon the Defendant applied to the Court for further Time, and had a Rule for further Time to plead; the Defendant staid till the Time was expired, and then demurred generally. Mr. F. Counsel now moved to set aside the Demurrer, and that the Plaintiff might have Liberty to sign Judgment; because the Defendant had not pleaded an issuable Plea, as is the usual Practice in all Cases where he moves for Time to plead, and it is under these Circumstances only that the Rule is granted; so is the common Practice in Cam' Scacc; and tho' he could not produce a Precedent in this Court, yet the Reason of the Thing is the same; for otherwise the Obtaining the Rule would only be a Trick of the Defendant's to get Time in Order to delay the Plaintiff's Proceedings; for the Defendant may, at any Time before Judgment, waive his Demurrer and plead over.

Arbitration Bond.

Defendant, after further Time given him by the Court to plead, may demur generally.

P. and the rest of the Justices against the Motion. There are two Ways of Pleading the General Issue; the one when the Plea goes to the Fact, and concludes to the Country; the other is by Demurrer, which is an issuable Plea in Law; we do not indeed in these Cases allow him to plead a dilatory Plea, as in Abatement, &c. but upon Demurrer the Plaintiff may join Issue, and have Judgment upon the Pleadings. I do not see how the Defendant could have pleaded a



general Plea to the Country; for should he rejoin and plead no Breach, that would have been a Departure from his first Plea, and would admit an Award. When the Defendant moves for Time to plead, he does not by that Means waive any other Advantage; and so the Motion was denied per Cur'.

*Innys versus Sinclear, Pasch. 6 Geo. II.  
B. R. Vide Holmes versus Mendese,  
Case 106.*

( 65. )  
Bail upon  
Affidavit.

THE Defendant was arrested, and held to Bail, upon Affidavit made by a third Person, and not by the Plaintiff himself, of a Note which he had seen in the Hands of a Notary Publick at Hamborough, whereby the Defendant promised, &c. to pay the Plaintiff, &c. Mr. F. moved to discharge the Defendant upon common Bail, because the Affidavit was not sufficient to ascertain the Cause of Action.

Mr. S. Counsel opposed the Motion, and offered to supply this Defect by a supplemental Affidavit. To which it was answered, that 12 Geo. 1. intituled an Act to prevent frivolous and vexatious Arrests, makes it necessary for the Affidavit to be previous to the Arrest, and so are the express Words of the Act; but in this Case it is admitted, that the Affidavit upon which the Arrest was made is insufficient; it must therefore be thrown out of the Question, and then how will the Matter stand; it will stand thus, that the Defendant was arrested without any Affidavit at all, which is illegal, and contrary to the Act of Parliament, which enacts, that no Person whatsoever shall be arrested and held to special Bail, unless Affidavit be made by the Plaintiff, that his Debt is upwards of 10l. and except the Sum sworn to be indorsed on the Back of the Writ. On the other Side it was said, that the Plaintiff in this Case had in every Respect complied with the Terms of the Act of Parliament; for in the first place, here is an Affidavit of the Debt made before the proper Officer, and the Sum sworn to is indorsed on the Back of the Writ; by which it sufficiently appears, that the Cause of Action is such as will hold the Defendant to special Bail; and tho' it is not entered so regularly as perhaps it might have been, yet certainly the Plaintiff is now at Liberty to supply the Defect by a more perfect Affidavit; and in this last Affidavit, the Cause of Action is sworn to, and the Defendant's Acknowledgment of the Debt; and the Case of *Hobhouse and Hansell*, Pasch. 4 Geo. 2. which

was

was to this Effect; Plaintiff made Affidavit before the proper Officer, that the Defendant was indebted to him in the Sum of 40 l. but did not swear to the Cause of Action at that Time, but afterwards, before the Purchasing the Writ, he made a fresh Affidavit of the Cause of Action; which was held good, because both Affidavits were before the Issuing of the Process. In the original Case the Court being divided, adjournatur.

Gambier ver. Wright, Pasch. 6 Geo. II.  
B. R. *Vide post* Case

**W**RIT of Error out of the Common Pleas in an ( 88. )  
Action of Debt upon an Escape; the Case was Error.  
this: J. S. was taken upon a Latitat issuing out of this Escape.  
Court at the Suit of Wright, and committed to the Custody of the Marshal of the Court of King's Bench, and was afterwards brought by Habeas Corpus before Denton J. of the Common Pleas, who committed him to the Custody of the Warden of the Fleet, from whence he made his Escape; whereupon Wright brought his Action against Gambier the Plaintiff in Error, and had Judgment. H. Serjeant took two Exceptions; his first Objection was, that the Commitment to the Fleet was void; because it does not appear, that at the Time of bringing the Habeas Corpus there was any Process out of C. B. against J. S. and therefore the Commitment was illegal, and no Breach of Duty in the Warden to let him go at large; for the Commitment being insufficient, he was never legally in his Custody; and his being in the Warden's Custody does not make him a legal Prisoner. The Plaintiff in his Declaration sets forth, that J. S. was in Custody of the Marshal upon a Latitat issuing out of this Court; that he was removed by Habeas Corpus, and committed by Denton one of the Judges of the Common Pleas, to the Fleet; but does not alledge any Process in that Court returnable against him.

The Question therefore will be, Whether a Jurisdiction is to be intended, where nothing appears upon the Record? He said, he not did doubt but that there was Process at that Time against him, (the Defendant) but the Objection is, that nothing of this appears upon Record; and therefore the Commitment must be taken to be *Coram non iudice*; for the Jurisdiction of Inferior Courts is not to be intended. Whenever a Man is brought into this Court by Bill, the Plaintiff always declares in Custod' Mareſch; so if the Process be by Original, the Declaration always sets forth *quod summonitus fuit ad respondendum*. In like Manner, where an Attorney sues



sues out a Writ of *Privilege*, it always appears upon the Process that he is an *Attorney*; and this is the constant Method of proceeding in C. B. If the Defendant was committed in C. B. without any Process, the Commitment is void. 1 Rol. Rep. 217. *Hildersham's Case*. Cro. El. 223. pl. 4. Lutw. 1468. Moore 274. 2 Leon. 84. 2 Bulst. 62. Cro. El. 877. Cro. Jac. 394. 1 Rol. Rep. 276. So where the Process is out of Court, an Action of *Escape* will not lie. Salk. 273, 700. *Shirly and Wright*; and in 4 & 5 W. & M. c. 21. it is said, if any Defendant be charged in Custody by Virtue of any Writ or Writs; but in this Case it does not appear there was any Writ depending; it is only said, he was imprisoned *virtute commissionis prædictæ*; which is not sufficient without Process against him out of that Court. His second Objection was, That this Commitment is void in Point of Form; for the Commitment is not as usual to the Prison of the Fleet, but to the Custody of the Warden of the Fleet, which is ill; for the Commitments in C. B. are not personal to the Warden, but local, Prisonæ of the Fleet; and the Form of every Court is the Law of that Court, and must be followed.

To these Objections Mr. D. answered, That by the *Habeas Corpus Act* every Judge hath the same Jurisdiction as the Court it self; it is a general Rule in Law, that all Superior Courts have an universal Jurisdiction, and the contrary shall never be presumed, unless it appears upon the Face of the Record, The Plaintiff in this Case has set forth as much as fell within his Privy; he says, J. S. was in Custody, &c. that he was removed by *Habeas Corpus* and committed, charged *inter alia*, &c. The Plaintiff is a Stranger to his Commitment to the Fleet, and not necessary for him to set out more than his own Case; as in an Action against Assignees, he is supposed to know his own Title, but not his Adversary's. There is not so much as one single Instance produced, which shews the Form of declaring in those Cases to be in the Manner contended for, and the Truth is, there is not one Case in all our Books where any Averment is made of the Process, &c. but there are many Precedents which shew the contrary, as in Lev. Ent. 56. vide 2 Brown's Entr. 13 & 14. Rob. Entr. 307. Lil. Entr. 157, 188. As to the second Objection he said, There is no Difference between a Commitment to the Custody of the Warden of the Fleet & Prisonæ of the Fleet, they are the same Thing in Reason and common Parlance; for when a Man is committed to the Prison of the Fleet, he is committed to the Custody of the Warden of the Fleet, and so *è contra*. This Way of declaring is said to be contrary to Form, and that the Precedents are all otherwise; but if it be the same in the Substance, the Difference in Expression

pression will not vitiate it; and in *Lil. Entr.* 161. A Commitment is entered as this is; so in *Rob. Entr.* 302. A Person may be committed to the *Marshalsea* Prison, notwithstanding the usual Form of Commitments, it is to the Custody of the Marshal; and in the late Act of Parliament for Relief of insolvent Debtors, it is said, a Person committed to the Custody of the Warden, which plainly shews it to be the same Thing as a Commitment *Prison* of the Fleet. But admitting the Form of this Commitment to be irregular, it is only erroneous, but not in itself void; for the Court had a Jurisdiction originally. 1 *Salk.* 272, 348. 5 *Mod.* 19. *Carth.* 148. And so concluded, that should this be taken to be a Defect in the Form of a Commitment, the Plaintiff shall not take Advantage of the Error upon an Escape, but shall be liable notwithstanding; quod fuit concessum per Curiam to be an established Rule. And as to the Form of the Commitment the Court held it good; and tho' a Commitment to the Prison of the Fleet may in some Respects be said to be local, yet it is not so to all Intents and Purposes; for suppose a Prisoner escapes, and afterwards the Warden resigns his Office, shall the new Warden be answerable for this Escape? he certainly shall not. And the Court seemed to think it not necessary for the Plaintiff in this Action to shew there was any Writ in C. B. against J. S. for it shall not be intended to the contrary. Sed adjournatur, to be spoke to again.

### King versus Inhabitants of Utoxeter, Pasch. 6 Geo. II. B. R.

THE Court after great Deliberation resolved, that a *Certiorari* did not lie to remove a Poor's Rate; that if the Rate be not a legal Rate, or if it be unequal, the Party aggrieved may there appeal to the Sessions for his Remedy upon the Distress; and so it was determined in *Anne*, in the Case of *St. Mary's* in *Marlborough*. A Rule was made to return the Poor's Rate, but was afterwards quashed.

( 97. )  
*Certiorari* lies  
not to return  
a Poor's  
Rate.

### Hays versus Warren, Pasch. 6 Geo. II. B. R.

ACTION upon the Case upon several Promises for Work and Labour done. Judgment by Default; the Defendant brought a Writ of Error, and assigned general Errors.

H h

Mr.

Labour, not laid to be done *ex Requisition* Defendantis.

( 98. )  
Error.  
Case on Assumpsit for  
Work and



Mr. H. Counsel objected, that the Plaintiff did not appear to have any Cause of Action. This is an Action for Work and Labour done; there are several Counts in the Declaration, and it is not alledged in any one of them that this work was done ex Requisitione of the Defendant; this Action is grounded upon a past Consideration, the Plaintiff sets forth *cumq' etiam* the Defendant in Consideration that the Plaintiff *performasset & perfecisset*, &c. he promised, &c. This is in the Preterperfect Tense, and is for a Consideration passed, and therefore ought to have been coupled with a Request. 1 Rol. Abr. This is not Want of Form only, it is a Defect in Substance, and would not have been helped by the Statute of Jeofails, if a Verdict had been given in this Case. Cro. Eliz. 442. Jeremy and Goochman. *Assumpsit*, and declares, that in Consideration *quod deliberasset & dedisset* to the Defendant twenty Sheep, he assumed to pay unto him 5 l. at the Time of his Marriage; and alledged *in facto* that he was married; the Issue was *Non assumpsit*, and found for the Plaintiff; and moved in Arrest of Judgment, because it was for a past Consideration; for it is in the Preter-Tense *deliberasset*, &c. and therefore no Cause of Action; and of that Opinion was the whole Court, and therefore Judgment staid. So Cro. Eliz. 741. Barker and Hallifax; *Assumpsit*, whereas the Defendant such a Day and Year, in Consideration that the Plaintiff by the Defendant's Appointment, and for his Debt, *paulo ante tunc solovisset* to R. S. 60 l. that the Defendant assumed to pay it upon Request, &c. the Defendant pleaded *Non assumpsit*; and it was found against him; and after Verdict, upon Motion in Arrest of Judgment, the Judgment was staid; because the Payment of the 60 l. being a past Consideration, was not sufficient to maintain the Action. But Note; The Court seemed to think these Cases were not Law; because here was a good Consideration, and the Defendant has reaped the Benefit of it. In 3 Leon. 91. Merry and Lewis, which Cases are cited 2 Vent. 75. in Consideration he would repair a House at the Defendant's Request, he promised to pay, and alledged that he repaired it; and this was held naught after Verdict, for not saying he repaired it at Request. And so it was adjudged Pasch. 11 Ann. Powel and Coke Infant. No Assumpsit will lie upon a past Consideration, unless there be a Request which couples it to the Promise, where it is laid in the Declaration that the Defendant *inde* stood indebted, &c. A Request may not be necessary, because it is alledged to be a Debt, and it continues to be a Debt till it is discharged. So where it is alledged, that the Defendant in Consideration the Plaintiff had bargained and sold, &c. in this Case the Plaintiff need not aver a Request, because a Bargain and

and Sale implies as much; it is *Actus contra actum*, which couples the Request to the Consideration; but an *Assumpsit* for Work and Labour done, as it is laid in this Case, viz. *quod performasset & perfecisset*, cannot imply a Request, because it might be done without the Knowledge or Privity of the Defendant; and therefore an Action will not lie, unless it be expressly averred to have been done ex Requisitione of the Defendant.

Mr. S. Counsel *cont'*: He agreed, that in the old Books it was held, that a Request was necessary, but that these Niceties in Pleading had introduced great Inconveniences, and for that Reason the Law was now altered. *The Cases that have been cited out of Cro. Eliz. cannot be held for Law at this Day*; in fol. 442. it is said there was no Request, but it is alledged *quod deliberasset*, which implies a Request; for he could not have delivered it to the Defendant, unless there had been an Acceptance, and that necessarily imports a Request and Privity in the Defendant; and in fol. 741. it is alledged to be at the Defendant's Appointment; which can be taken no otherwise, than at the Request of the Defendant he had done so and so. The Case in 3 Leon. 91. he agreed to be good Law, but that was for Work and Labour done for a third Person, and therefore the Defendant could not be liable unless it was done at his Request; but in the present Case it is said, *quod performasset & perfecisset pro eodem Carolo*, which distinguishes it from the Case in Leon. the Reason of this Case is against them. It is objected, that there does not appear any previous Request; but it appears the Defendant had the Benefit of the Work and Labour, which is the same Thing, and equal to a Request. In Raymond 260. the Case of Church and Church, where in *Assumpsit* the Plaintiff declared, that whereas the Plaintiff had at his own Charge buried the Defendant's Child, the Defendant promised to pay him his Charges; and tho' there was no Request laid, yet Judgment was given for the Plaintiff. So in Hestl. 84. Franklin and Bradel; *Assumpsit*, That whereas the Plaintiff had served the Defendant & Ux', the Defendant after the Death of the Wife promised to pay, &c. it was moved in Arrest of Judgment, that it was a past Consideration, and there was no Request alledged; but adjudged it was a good Consideration, and that the Service was to the Benefit of the Defendant; and therefore that in Consideration that the Plaintiff had married the Daughter of the Defendant is a good Consideration; so in Consideration that you have been my Surety, I promise to save you harmless; so in Consideration that the Plaintiff was Bail for the Defendant, he promised to give him a Horse, this is good; so in Consideration that J. S. being



being a Carpenter had well built my House, I promise to give him 5 l. And it is not necessary in any of these Cases to alledge a Request; because the Benefit which the Defendant receives is a good Consideration, and necessarily implies a Request; and to this Purpose was cited likewise 2 Lecn. 111. Marsh and Rainsford, and 2 Leon. 225. He further argued, that if the Court should be of Opinion that a Request was necessary, that there was sufficient Matter alledged in the Declaration to import a Request; it is said, that whereas he had done such Work that the Defendant *inde* promised to pay, &c. so that the Promise is laid to be on the same Day that the Work was performed; and therefore may be taken to be a Promise before the Consideration was past, *scil.* before the Performance of the Work, for the Law makes no Fraction of Days. Latch 150. 1 Rol. Abr. 12. pl. 13. And if it be taken this Way, a Request is not necessary. It is likewise alledged, to be for Work done *pro eodem* Carolo, and that is as much as to say, that it was Work done at the Request of the same Charles; it is laid in the *Quantum meruit*, that he deserved so much Money from the Defendant, and he could not deserve so much, unless the Defendant lay under an Obligation to pay it. Latch 112, 274.

Raymond C. J. Where the Facts are so stated upon the Face of the Declaration, that it appears that the Defendant had the Benefit of them, an Action will lie, if the Consideration arises upon a mutual Agreement; as if it be alledged, that whereas the Plaintiff Vendidisset, &c. the Defendant promised; this imports a Consideration and a Request, for the Vendidisset takes in the Concurrence of both Parties: But in the principal Case, it is neither said to be at the Request of the Defendant, nor does it appear that he reaped any Benefit by it afterwards. This Action is grounded upon a Promise made for a past Consideration, it is alledged on such a Day he did the Work, and *postea* the Defendant promised to pay. In some Cases the Law does not allow of any Fraction of Days, in other Cases it will; but in this Case it is evident the Consideration was past. If a Man should come and say he built a House for me, and it does not appear that I had the Advantage of it, an Action will not lie. In all those Cases where the Action is held good, notwithstanding the Omission of a previous Request, it appears the Defendant had a Benefit, which by Implication carries a Request along with it. The Statute of Jeofails does not extend to this Case; here wants Substance, and nothing is cured by those Statutes but Defects in Form only.

P. P. and L. Justices were all of the same Opinion, that the Judgment should be reversed; for that there appears  
 5 nothing

nothing thro' the whole Declaration but a bare Averment, that the Plaintiff had done so much Work, without alledging any Request previous to the Consideration, or any Benefit subsequent; and there is not one Case wherein the Action hath been held maintainable, but there is an express Request set forth in the Declaration, or something else, wherein it may be inferred the Defendant had received a Benefit. Work may be done for a Man without his Request or Privity; if a Man will enter upon my Land, will pull down my House and build up a new one, without my Consent and Approbation, the Law gives me the House; and the Plaintiff hath no Remedy for Work and Labour done; the old House might be as commodious for me to live in, as a new one; and an Action will not lie, unless the Consideration is grounded upon a precedent Request, or a subsequent Benefit and Approbation. In the Case of Bail, can a Man come afterwards and say he reapt no Advantage from it; it appears clearly he had a Benefit; so for Charges in burying another Man's Child; and in all the other Cases there is a Benefit arising to the Defendant on a Request alledged in the Declaration. The Statute of Jeofails does not extend to the present Question; and so Judgment was reversed *per totam Cur'*. Vide *Hob. 105. Lampleigh and Brathwait. Dyer 272. Hunt and Bates. Dyer 355. b. Oneley's Case. Cro. Eliz. 442, 59. Marsh and Kavenford. Cro. El. 442. Jeremy and Goochman, contra. Cro. El. 741. Barker versus Halifax, contra.*

Bishop *ver.* Stracey, Pasch. 6 Geo. II.  
B. R.

**A**CTION upon the Case upon several Promises; and the Plaintiff declared against the Defendant in Custodia Domini Regis Mareschalli, &c. The Defendant demurred specially, and assigned for Cause, that the Stile of the Court was ill set out; for as this Case stands, it does not appear the Defendant is before the Court. In all Cases, where the Defendant is sued by Bill in this Court, he is in the Declaration to be *in Custodia Mareschalli Mareschalsie Domini Regis, coram ipso Rege existen'*; this is the proper Stile, and it is this which gives the Court a Jurisdiction. The second Cause of Demurrer was, because it was said generally the Plaintiff came, &c. and it does not appear in what Manner, whether by Attorney, in proper Person, or by Guardian; and it cannot be intended he comes *in propria Persona*, because it is not said *secundum legem & privilegium hujus Cur'*; there are

( 99. )  
Action upon  
the Case.  
Demurrer.



many Instances where the Pleadings have been held ill, because the Attorney's Name has not been specially mentioned, but only said *quod venit, &c. per Attornatum suum*. 1 Rol. Abr. 796. pl. 28. So there are Cases where it has not appeared, in what Manner, or by whom the Party appears; as in 1 Rol. Abr. 794. 12. it was said *quod defendens venit & comparuit* generally, and this was held to be Error, because it did not appear by the Record, whether in proper Person or by Attorney.

Mr. D. Counsel *com'*: There are numerous Precedents in the Books, where the Parties may both sue and defend *in propria persona*; and it being altered generally in this Court, it must be intended he came in proper Person. As to the Stile of the Court, there are a great many Acts of Parliament where the Description of the Court is set out in the same Manner, in Custody of the Marshal of the King's Bench; the Description of the Office of the Marshal of this Court is not so strictly regular as to admit of no Variation or Diminution; for in 2 Salk. 439. a *Sci' Fac'* was brought against a Bail, and the Breach assigned was, that the Defendant had not rendered himself *Prisona Mareschalli Mareschallie Domini Regis*, omitting the Words *coram ipso Rege*; and yet this was held good, notwithstanding it was objected the King had another Marshal, and that is the Marshal of the Household; for the Marshal of the King is the Marshal of the King's Bench, and no Body else can be understood. So in 2 Salk. 602. *Sci' Fac'* on a Recognizance of Bail, assigning Breach, that the Defendant did not pay, nor render *Prisona Mar' Maresch' nostra*, without saying any Thing further, and yet it was held good and sufficient; and in the Stat. 8 & 9 W. 3. c. 6. it is called the Marshal of the *Marshalsea* of the King, without saying *ipso Rege*.

*Cur'*: Both the Objections seem to be strong ones; for altho' in Common Parlance an Office may be so described as to be understood, yet in Pleading it must be described in that Manner in which it is taken Notice of in Law; Acts of Parliament do not always so strictly follow the Description of Things as is necessary in Pleading. Suppose an Information in the Name of the Marshal of the King's Bench, or should an Action be brought against Mr. *Ventris*, would it be sufficient to declare against him by the Name of the *Master* of the King's Bench? As to the other Objection, they held it was necessary to shew in what Manner the Plaintiff comes and appears, whether by Attorney, Guardian, or *in propria persona*; and it is not sufficient to say generally he comes and appears, for that cannot be intended an Appearance in proper Person. *Sed adjornatur*.

*Pasch. 8 Geo. 2. Trueby versus Baker.* Error upon a Judgment in C. B. and the same Objection was taken by *Burrel*, that it did not appear in what Manner the Plaintiff sued, whether by Attorney or in proper Person.

**Weal versus Smith, Pasch. 6 Geo. II.**  
*B. R. Vide post Case III.*

THE Plaintiff had Judgment, and before Execution a Writ of Error *coram vobis*, &c. was brought, pending which the Plaintiff sued out a *Fi Fa* by the Name of *Neal*, by Virtue of which Writ the Defendant's Goods were taken in Execution; but the Plaintiff afterwards finding out his Mistake, sued a second *Fi Fa* before the Day on which the first was returnable; and by Virtue of this second Writ the Sheriff continued in Possession of the Defendant's Goods; whereupon the Defendant moved to set aside Execution, and to have his Goods restored; and took two Exceptions, 1<sup>st</sup>, That the Plaintiff could not sue out Execution pending the Writ *coram vobis*; and 2<sup>dly</sup>, That the first *Fi Fa* being wrong, the Sheriff could not detain the Goods in Execution. As to the first Objection it was answered, that Error *coram vobis* was no Superfedeas, unless Bail be put in; and in all Cases where this Writ has been allowed, (for it is but a modern Innovation in the Law,) Bail has been put in; and so it was in the Case of *Jones versus Palmer*, 13 Geo. 1. before *Raymond C. J.* it was said, there was no Cases directly in Point, tho' there are Cases which seem to intend as much; as in 1 *Vent.* 207. and *Lil. Pract. Reg.* 1 Vol. fol. 528. And Writs of Error are not to be favoured, because in Delay of Justice, which occasioned the making the Statute of 3 Jac. 1.

Mr. F. Counsel cont': There is a Case in 3 *Bulst.* 62. which is in Point; for it is there said by *Coke C. J.* that in taking Bail upon a Writ of Error, this Rule is to be observed; if the Error assigned be Matter in Law, then the Use is to take Bail of the Party; but if the Error be upon Matter in Fact, then the Use is not to take Bail before this Matter of Fact be tried; and so is the Difference. This comes up exactly to the Case in Question; for Error *coram vobis* goes to Matter of Fact only, and cannot be assigned for Matter in Law; for the Court is supposed to have determined that upon the Record before; a Writ of Error is a Writ of Right, and the Statute has always been construed strictly; for it has always been

(100.)  
 Judgment,  
 and Writ of  
 Error.



been held *not to extend to Executors or Administrators*; and yet they are *within the Meaning of the Statute*, tho' not within the Words of it; and yet if *Executors will come voluntarily and put in Bail, they cannot afterwards waive it*; and the Case of *Jones and Palmer* was no more, the Plaintiff went and voluntarily put in Bail.

*Cur'*: This Writ is discretionary, and is not a Writ of Right *ex debito Justitiæ*; and therefore, when it is allowed by the Court, they may put what Terms they please upon it; but doubted whether Bail was absolutely necessary.

*L. J.* seemed to be of Opinion, that *Bail was necessary*; and cited the Case of *Walker and Stoker*, *Carth.* 367. where it is so held; so where a Writ of Error abates by the Death of a Party, *the second Writ is no Superfedeas without Bail*; and was so held in the Case of *Butler and Lucitans*, 4 *Geo.* 2. which seems to be of the same Nature with *Error coram vobis*; he cited likewise the Case of 1 *Vent.* 31. 1 *Mod.* 285. As to the second Objection, Serjeant *Eyres* said there was no Pretence of any Fraud in this Case, the Judgment is legal, and for a fair and honest Debt; the Complaint is, that there was a Mistake in the first *Fi' Fa'*, and that is admitted; it was the Mistake of the Clerk, and as soon as the Plaintiff was aware of it, he took out a fresh *Fi' Fa'*, and it is by Virtue of this second Writ, (which is a good Writ,) that the Goods are held in Execution. The first *Fi' Fa'* was void, and is to be considered as if no Writ had issued at all; and the Defendant may have his Remedy by Action against the Plaintiff for taking his Goods tortiously, but that will not make the second *Fi' Fa'* void. We are now legally in Possession of the Goods, and therefore Execution ought not to be set aside.

*Mr. F. cont'*: It is admitted that the first Execution is bad, when therefore that is set aside, all subsequent Process served upon the Defendant under that Execution fails likewise. As where a Man is arrested in a wrong County, and during his Arrest is served with fresh Process, when he comes to discharge himself of the Arrest, every Thing that was served upon him under the Arrest is discharged likewise. So where Goods are taken wrongfully, they cannot afterwards be charged legally under that tortious Execution. *P. J.* The Mistake in the first *Fi' Fa'* appears to be nothing but the Misprision of the Clerk; here is a good and legal Judgment, and the Plaintiff is intitled to his Execution; but in taking out a *Fi' Fa'* the Clerk by Negligence has put an *N* instead of a *W*, but the Plaintiff, as soon as ever he found out his Mistake, took out a new *Fi' Fa'*, and that was before the first was returnable; and there is no Pretence of a Fraud or Trick in the Plaintiff to charge the Defendant's Goods wrongfully.

P. J. The Execution in this Case is originally void; and the Plaintiff cannot come and by a subsequent Act supply the Defect of that Execution; the Goods were wrongfully taken, and therefore the Detaining them must be wrong also; and every subsequent Charge upon them is void; and this is a constant Rule in all mesne Process, if the original Process fails, all that has been done subsequent thereupon must fail likewise. Had the Goods been once restored, the second Execution by Virtue of the last *Fi Fa* had undoubtedly been good; but in this there was no Restitution, but all that was done, was during the Continuance of the first Tort. L. J. was of the same Opinion with P. he thought there must be some Evidence of a tortious Act, before this Execution could be set aside. But the Court gave no absolute Opinion, but took Time to consider upon both Points.

Poulter *versus* Greenhall, High Sheriff of the County of Lancashire, Pasch. 6 Geo. II. C. B.

Prisoners may be assigned over by Parol to succeeding Sheriffs, notwithstanding the Writ in the Register is by Deed. Vide 2 Rol. Rep. 146. Dalton's Office of Sher. 3 Rep. 72. Wesby's Case. 1 Sid. 335. Hanmer *versus* Winmor. But the new Sheriff may compel the old Sheriff to make an Assignment by Indenture. (101.) Prisoners assignable over by Parol.

The King *ver.* Cotten, Trin. 6 Geo. II. B. R. Vide antea.

FOR an Information against the Defendant, for convicting and charging a Man as the reputed Father of a Bastard-Child, without either Warrant or Summons; and cited the Case of the King and Allington *ab Venables*, 12 Geo. 1. Conviction by the Mayor of Hartford, for selling Ale without a Licence, and upon Affidavit that the Defendant was convicted without any Summons, an Information was granted; and so was the Case of the King and Heber, Pasch. 5 Geo. 2. which was a Conviction upon the Game Act; and so in the Case of the King and Clogg, and the King and Holland, being both Orders of Bastardy, Information was granted because no Summons. (102.) Information for convicting a Man of being the reputed Father of a Bastard-Child, without Warrant or Summons.



*B. and C. Serjeants con'*: They endeavoured to distinguish this Case from the Case of a Conviction; and said this was only an *Adjudication*, and not an *absolute Conviction*; for by 18 Eliz. the Sessions have an *original Jurisdiction*, and an *Appeal lies*. Suppose the Justices had made no Order at all, but only bound over the Party to appear at the next Sessions; this certainly would have been no Conviction; and the present Order may be considered in the same Light. *It may be compared to the Case of an Indictment, which is always found against the Defendant, without any Notice, and cited the Case of the King and Backwell, Mich. 4 Geo. 1. The Defendant moved to have a Conviction of Bastardy set aside, because it did not appear there was any Summons; but the Court denied the Motion. They then argued from the Inconvenience that would arise, should a Summons be held necessary; for by this Means the Party would have an Opportunity to run away and escape.*

*The Court agreed, that to convict a Man without a Summons, or giving him an Opportunity to make his Defence, was against natural Justice. That it was an Excess of Power usurp'd by the Justices, and that by this Means the Defendant had been greatly injured; had not only been deprived of his Liberty, but that it was a great Scandal and Reflection upon him. The Words of the Act of Parliament in this Case are very strong, viz. That the Justices upon rightly and duly examining into the Matter may, &c. Can the Matter be said to be rightly examined into, when one Side only is heard? This is undoubtedly an irregular Proceeding in the Justices; but whether it was to be considered as such an Abuse of Power, as to draw down the Censure of this Court in so extraordinary a Manner, was the Question. There does not appear to be Prejudice or Oppression to the Defendant in this Case; and when nothing of this appears, the Court ought to be cautious in its Proceedings against Justices of the Peace, who serve their Country without Profit or Reward. The Defendant is not without Remedy; if he has received any Injury, he may have an Action of false Imprisonment; and therefore refused to grant the Information.*

*L. J. said, had this been a Conviction, the Summons ought to have appeared upon the Face of it, or the Court would not intend it; otherwise in the Case of an Order; for then the Court will presume a Summons till the contrary appear; he said, he was inclinable to think this was not a Conviction; and that this Distinction was taken in the Case of Bastardy afore cited. By 3 Car. 1. Sessions have an original Jurisdiction.*

Gale *ver.* Mottram, Trin. 6 Geo. II.  
B. R. *Vide antea* Case 64.

**D**EBT upon a Bond conditioned to submit to an Award; the Defendant craved Oyer, and pleaded no Award. Plaintiff rejoins, that after the Submission both Parties entered into Articles to account; and upon an Account fairly stated, the Defendant appeared to be indebted to the Plaintiff in the Sum of 400 l. and therefore the Arbitrators awarded, that the Defendant should pay that Sum to the Plaintiff's Agent; and assigned for Breach that the Defendant had not paid, &c. And upon Demurrer Exception was taken to the Award, because this Money was ordered to be paid to a third Person, and not to the Plaintiff himself; and cited 1 Rol. Abr. 243. pl. 6. 247. pl. 4. Cro. Eliz. 4. Godbolt 12. and the Case of Lane and Tanner, Pasch. 12 Anne, where it was awarded, that the Defendant should deliver to the Plaintiff certain Lands in Possession of a third Person, &c. and it was held that the Award was ill; for the Defendant had not a Power over the Land, and consequently could not deliver it up without being a Trespasser.

(163.)  
Debt upon  
an Arbitra-  
tion Bond.

Mr. F. *con'*: This Case differs from the Cases cited; for the Person, to whom the Money was to be paid, was not a Stranger, but Agent for the Plaintiff; and it was his Duty to receive it.

To appoint Money to be paid to Trustees for the Plaintiff's Use is good, so it is to be paid to such Person as the Plaintiff should appoint to receive it; and in these Cases Tender and Refusal is a good Performance of the Award, and may be pleaded in Bar to any subsequent Action, for it is in Effect Payment to the Plaintiff himself.

*Cur'*: The Person to whom the Money was to be paid is said to be the Plaintiff's Agent, and it is the same Thing as if it had been ordered to be paid to the Plaintiff himself; and Tender and Refusal is a good Performance: Suppose it had been ordered to be paid to the Plaintiff's Order, certainly a Tender to the Plaintiff's Order had been good; for Payment to a Man's Order is Payment to himself. The whole Court being of this Opinion, the Defendant desired Time to look into it; and thereupon Judgment was not given.

The



The King *ver.* Ames, Trin. 6 Geo. II.  
B. R.

( 184. )  
Order of Sessions.

TO quash an Order of Sessions, which was made to discharge an Apprentice from the Defendant *Ames*, who was a Carpenter by Trade, and that the Defendant should return and pay back 5 *l.* to the Use of the Apprentice.

Mr. *S.* Counsel took four Objections. 1<sup>st</sup>, That this was not a Trade within the Statute, and so the Justices have no Jurisdiction. 2<sup>dly</sup>, It does not appear the Defendant received any Money from his Apprentice. 3<sup>dly</sup>, The Sessions have no Power or Authority to order the Master to refund; and 4<sup>thly</sup>, It does not appear the Master was ever summoned, or had Notice of the Complaint.

To these Objections Mr. *F.* answered. And as to the fourth he said, there was no Occasion to set forth a Summons, for this comes before the Sessions as a Court of Record, and therefore not necessary to set forth more than to shew they have a Jurisdiction; and the Statute which gives the Sessions a Jurisdiction, does not make a Summons necessary. *Vide* 5 *Eliz. c. 2. 1, 35.* which provides, "That the Master or Apprentice having Cause of Complaint shall repair to one Justice of Peace, and shall take such Order therein as the Equity of the Case shall require; and if he cannot agree the Matter between the Parties, then he shall take Bond of the Master to appear at the next Sessions, &c." So that the Master is at his own Peril obliged to take Notice and appear; if he does not, the Sessions may discharge the Apprentice in his Absence; and so is *Dillan's Case*, 1 *Salk.* 67. and *Ditton's Case*, 2 *Salk.* 490. for the Master shall not take Advantage of his own Obstinacy. As to the third Objection, he said, as the Justices may discharge an Apprentice, so they may also order a Restitution of the Money, within the Equity of the Statute. The Justices have a Power to raise Money in order to put out an Apprentice, by the same Reason they may have a Power to order Money to be restored; and this is a Power consequential upon their Jurisdiction to discharge. 1 *Salk.* 67, 68. 2 *Salk.* 491. As to the second Objection, he admitted, that it was not said expressly that the Master had received any Money with his Apprentice, but the Words are tantamount, and as strong by Implication as possible. The Words are, "That the Master shall return and pay back", which he could not do, unless he had received. As to the first Objection, he said, that in *Gately's Case*, 2 *Salk.* 471. it was held,

held, that the Power to discharge Apprentices extends only to such Trades as are specially mentioned in the Statute; but there are other Cases where it is said that Statute is to be taken liberally, and to extend to all Apprentices. 1 *Saund.* 313. 2 *Keb.* 592. But this Case does not fall within the Equity of the Statute, but within the express Words of it; for in the 30th Section, where Mention is made what Trades may take Apprentices, the Trade of a Carpenter is expressly mentioned; and then comes the 35th Section, which gives the Sessions a Jurisdiction, and says, "If any such Master, &c." which is merely relative to Trades mentioned in the 30th Section.

Mr. S. Counsel *cont.* It is insisted, "That if the Master does not appear, that his Non-appearance does not defeat the Jurisdiction of Sessions, but they may discharge the Apprentice in his Absence; and in order to support this Doctrine, Recourse is had to the Statute, that Application is to be made originally to a Justice, and that if he cannot reconcile the Matter, then he is to take a Bond for the Master's Appearance at the next Sessions." And indeed, had the Circumstances of the Case been so in Fact, the Master must have appeared at his Peril; but nothing at all of this appears, and it is well known the Sessions have an original Jurisdiction; he admitted, that upon looking into the Act of Parliament, it looked as if a prior Application to some Justice of Peace was necessary, but it had always been determined otherwise, and the Word (*shall*) is not compulsory, but directory only; and so is the Case of the *King* versus *Johnson*, 1 *Salk.* 68. 2 *Salk.* 491. S. C. It must therefore, as this Case stands, be now taken, that it came originally before the Sessions, and therefore Notice was necessary. The Cases cited by Mr. F. make for the Defendant, for by them it appears the Master was summoned; and if after that he will make Default, the Sessions may undoubtedly proceed; and so it was held in the Case of the *King* versus *Synpson*, which was upon a Conviction for Deer-stealing. But the Objection in this Case is not that the Master did not appear, but that he was never summoned? It is insisted, that by a strong Implication it does appear Money was given with the Apprentice; but Things are not to be taken by Inference, for there ought to be express Words to shew they have a Jurisdiction. As to the first Objection, he waived that, because the Trade of a Carpenter was mentioned within the Statute, or else it had been a strong Objection; as was held in the Case of the *King* versus *Wately*, *Mich.* 12 *Geo.* 1. which was an Order to discharge an Apprentice from his Master, who was by



Trade a Cutler; and the Order was quashed, because not within the Act.

*Cur.* It does appear that this Cause came originally before the Sessions, and therefore a Summons was necessary; the only Question is, whether it be necessary to set out this Summons in the Order? it is said in the Order, that upon hearing Counsel, but does not say, upon hearing Counsel on both Sides; tho' this seems to be a reasonable Construction, the Distinction that has been taken in these Cases between Orders and Convictions, seem to make a Summons not necessary in this Case; for this which is before us at present is no more than an Order of Sessions, and so a Summons must be intended, unless the contrary appears. The Statute which gives the Sessions a Power to discharge in Consequence thereof, gives a Power to order Restitution, or otherwise the Master would be a Gainer by his own Wrong. By a necessary Intendment it appears, that the Master has received Money with his Apprentice; for the Order is, that he shall refund and pay back, which is tantamount to Words that he shall return and pay back so much Money received. But the Court did not give any absolute Opinion, but took Time to consider.

*Martin versus Duckett*, Term. Trin.  
6 Geo. II. B. R.

(105.)  
Error to reverse an Outlawry.

**U**PON Error brought to reverse an Outlawry, Mr. D. Counsel moved to stay Proceedings till the Plaintiff in Error had put in Bail, as was directed by the Act of Parliament; and cited Carth. 459. Stat. 31 Eliz. c. 3. and 4 & 5 W. & M. c. 4. But the Motion was denied per *Cur.*; for the Plaintiff in Error is not obliged to put in Bail till the Outlawry is reversed; and the Writ of Error stays nothing before Bail is put in, but the Plaintiff may proceed to Execution. Vide Stat. 3 Jac. 1. c. 8.

Holmes

Holmes *ver.* Mendese, Trin. 6 Geo. II.  
*B. R. Vide Case 65. Innys versus*  
*Sinclear.*

THE like Motion was now made this Term, the Defendant having been arrested upon *Affidavit made by a third Person*, that he had seen the Defendant's Account Books, and by them it appeared the Defendant was indebted to the Plaintiff in the Sum of, &c. The Court granted the Motion, and said, this was not so strong a Case as that of *Innys and Sinclear*; where a third Person made Affidavit he had seen a Note of the Defendant's payable to the Plaintiff in the Hands of a Notary Publick.

(106.)

Affidavit to  
hold to Bail,  
insufficient.

Clark *versus* Paget, Trin. 6 Geo. II.  
*B. R.*

MR. V. Counsel moved to set aside all Proceedings, (the Plaintiff having proceeded so far, that Judgment was to have been signed that Morning, upon which the Motion was made); and his Objection was, that the Notice under the Writ was not according to Act of Parliament, which has chalked out the express Words in which Notice is to be given, and by that the Name of the Defendant is to be set out at the Head of the Notice; whereas in this Case the Defendant's Name was omitted, and only said generally, *You are served, &c. Vide the Stat. 5 Geo. 2. to prevent frivolous and vexatious Arrests.*

(107.)

Motion to  
set aside Pro-  
ceedings, the  
Notice un-  
der the Writ  
not being  
according to  
the Act of  
Parliament.

And upon a Rule to shew Cause, Mr. S. insisted, that the Meaning and Purport of the Statute was pursued; and that it was not necessary to include the Defendant's Name, where he was personally served; and it was not said that Notice should be in the Words following, 'but to the Effect following, &c.'

But the Court granted the Motion; for the Act of Parliament is express, and the Plaintiff must either strike the Letters A. B. out of the Act, or insert them in his Notice.

The



The King *versus* the Wife of Keat,  
Trin. 6 Geo. II. B. R.

(108.)  
Libel for  
Slander or  
Defamation  
in the Dis-  
junctive.

THE Defendant was libelled against in the Spiritual Court for Slander or Defamation, and a Writ de *Excommunicato Capiendo* issued against her; which Mr. K. Counsel now moved to quash, because the Charge was in the Disjunctive; viz. for Slander or Defamation, and cited the Case of the King and Smith, which was a Libel in the Spiritual Court *pro convictio sine Defamatione*; and the Court in that Case held the Libel naught, because uncertain and in the Disjunctive. But in this Case the Motion was denied, for Slander and Defamation have one and the same Signification; but there is a Difference between *Convictum* and *Defamatio*; for *Convictum* has a double Meaning, and signifies *Reproof as well as Scandal*.

Gregory *ver.* Warren, Trin. 6 Geo. II.  
B. R.

(109.)  
Proceedings  
against Bail  
stayed, a Writ  
of Error  
being allowed  
on the  
Day the last  
*Scire facias*  
was return-  
able.

TO stay Proceedings against the Bail; the Writ of Error in the original Judgment being put in and allowed on the same Day the last *Sci' Fa'* was made returnable. Mr. S. cont: This is a stronger Case than that of *Miers* and *Arthur*, and in that Case the Court said they would go no further; and yet there the Writ of Error was put in and allowed two Days before the Return of the first *Sci' Fa'*. But the Court in the original Case made a Rule to stay all Proceedings.

Paschal *versus* Terry, Trin. 6 Geo. II.  
B. R.

(110.)  
An Award  
set aside, be-  
ing made  
without gi-  
ving Notice  
to or hear-  
ing the De-  
fendant.

SUBmission to two Arbitrators, and if they cannot agree, to appoint an Umpire; they accordingly appointed an Umpire, who made his Umpirage the Day following; the Parties being neither summoned, nor having Notice of the Appointment. Mr. S. Counsel moved to set aside the Umpirage; and objected, that it was unreasonable, and contrary to natural Justice, to make an Award without giving Notice to the Parties

Parties to attend. This is repugnant to the Submission, and is a Misbehaviour within the Act of Parliament; the Umpirage was made upon the Defendant's Evidence alone, *parte alterâ inauditâ*, the Plaintiff was neither heard nor had any Opportunity given him to be heard; and for this Reason it was set aside *per L. and P. Justices, absente P.*

Weal *versus* Smith, 6 Geo. II. B. R.

*Vide antea* Case 100.

**L.** J. said, *Error coram vobis was no Superfedeas before* (111.) *Bail is put in;* and cited the Case of *Meresfield and Wellon*, 5 Geo. 2. where it was so held exprelly; and *Raymond* Chief Justice at that Time said it was so determined in the Case of *Ginger and Cook*. But this Point was not determined; for the Plaintiff in Error, seeing the Opinion of the Court, put in Bail. *Vide antea.*

Twells *ver.* Southwell, Trin. 6 Geo. II.  
B. R.

**M**R. T. moved to set aside a Judgment for Irregularity; (112.) and his Objection was, that common Bail was filed in Judgment, a Term subsequent to the Writ; this was an Action by *Latitat*, returnable the first Day of *Hilary* Term, and the Bail was not filed till *Easter* Term following, at which Time the Declaration was delivered.

The King *versus* Cotton & al, Trin.  
6 Geo. II. B. R.

**U**PON Motion for an Information the Case appeared to (113.) be this: By a private Act of Parliament made 27 *Ed.* Information, the Court-Leet for the *City and Liberty of Westminster* was confirmed, and a more extensive Jurisdiction given, &c. *Vide* the Statute. A Complaint was made in the Leet against *Edwards* (the Prosecutor) for Neglect of Duty; he behaved himself in a very insolent Manner, and made use of very contemptuous Language; put on his Hat in the Face of the Court, and said to the Judge, "*Jack Cotton commit me if you dare*". Whereupon the Defendant did commit him for

M m

this



this offensive Language and the great Contempt he shewed the Court. *Edwards* now came for an Information, suggesting that he was committed for a Neglect of Duty, notwithstanding he offered to put in Bail. But the Court, upon the Circumstances of the whole Case, refused the Motion; and held, that had the Commitment in this Case been for a Breach of the Peace, it had not been strictly justifiable, admitting Bail was offered. But this Commitment was for the Contempt; and tho' the usual Method of proceeding in those Cases, is in the first place to fine the Offender, and after to commit him for Non-payment, which Method was not pursued in the present Case, yet this appears rather to be a *Mistake in Judgment than any wilful Oppression; and therefore the Information was denied.*

Note; *Edwards* was a Petit Constable of the Lect.

### Term. Mich. 7 Geo. II.

**NOTE,** That this Term Sir *Philip York*, his Majesty's Attorney General, was made Lord Chief Justice of England, and the same Term was made a Peer of Great Britain by the Name of *Philip Lord Hardwicke.*

### *Barker ver. Reynolds and Westwood,* Mich. 7 Geo. II. B. R.

(114.)  
Trespass and  
Assault, an  
ill Justifica-  
tion thereof.

**T**RESPASS and Assault; *Reynolds* the Master pleads *Son Assault, &c.* and upon that Issue is joined. *Westwood* the Servant justifies, for that the Plaintiff having assaulted his Master, he then and there assaulted the Plaintiff in Defence of his Master; and to this the Plaintiff demurs.

Mr. A. Counsel *pro Quer* insisted, that the Justification was insufficiently alledged, and took two Exceptions; 1st, Tho' a Man may justify in Defence of his Master, yet he cannot justify an Assault in Defence, &c. and cited 2 Roll. Abr. 546. His second Objection was, that the Justification in this Case is ill pleaded; for the Assault in the Declaration might be at a Time preceding the Assault by the Servant, as this Justification now stands. The Words are, "(having assaulted,)" and tho' the Court should be of Opinion that a Servant may justify an Assault, &c. in Defence of his Master, yet he cannot justify an Assault upon the Plaintiff at a Time subsequent to the Assault made upon the Master.

Mr. M. Counsel *cont'*: A Servant may justify an Assault in Defence of his Master, and cited 9 Ed. 4. 48. 2 Rol. Abr. 546. 1 Salk. 407. *Leeward & Ur' ver. Basilee*. As to the second Objection, he said the Justification was well, for that the Words must necessarily be in the Preterperfect Tense, and could not be otherwise; for an Assault must have been committed, or it is certain the Defendant could not justify. And the Words (*then and there*) shew that the Assault mentioned in Justification was at the same Time and Place the Assault was made upon the Master.

T. C. J. *There is no Doubt but a Servant may justify an Assault in Defence of his Master; but the Question in this Case is, whether the Defendant by his Plea has shewn that the Assault was necessary in Defence of his Master; for it is only said, the Plaintiff having assaulted, &c. he then and there, &c. in Defence of his Master, which certainly is not sufficient; but he ought to have gone further, and shewn that the Plaintiff would then and there have beat his Master, if he had not assaulted the Plaintiff in Defence, &c. The Words, as they are now pleaded, (having assaulted) have Reference to a Time past; whereas the Defendant should have shewn that the Assault by him was at the Time the Master was assaulted; and the Words then and there will not confine this Assault to that Time, but may relate to the Day and Place only; whereas the Assault by the Servant might be at a different Time of the Day to the Assault made upon the Master. P. P. and L. J. being of the same Opinion, Judgment was given for the Plaintiff.*

### Cowne versus Barry, Mich. 7 Geo. II. B. R.

**A**CTION of Debt upon Bond conditioned to pay 100*l*. (115.) with Interest on the 5th of June, &c. Defendant after Oyer pleads Payment of Principal and Interest before the Action brought, *scil.* on the 26th of March, which was before the Day mentioned in the Condition. Plaintiff replies, that the Money was not paid *modo & forma*, as alledged in the Defendant's Plea. Upon this Issue was joined, and Verdict for the Plaintiff. Mr. K. Counsel moved for a Repleader; for that the Defendant having pleaded Payment before the Day mentioned in the Condition, the Issue thereupon is immaterial; and so he said it had often been determined in this Court.

Debt upon Bond.  
Plea of Payment at a Time before the Day in the Condition, aided by the Statute for Amendment of the Law, and a Repleader denied.

Mr;



Mr. B. Serjeant *con'*: The Defendant's Plea is not that the Money was paid before the Day mentioned in the Condition, but the Payment was *ante impetrationem Brevis*, scil. 26 March, which Plea is now aided by the Statute for Amendment of the Laws; and the *Scil.* is immaterial. *Vide Stat. 4 & 5 Ann. c. 16. which provides, that where an Action of Debt is brought upon any Bond which has a Condition, or Defeasance, to make void the same upon Payment of a lesser Sum at a Day or Place certain, if the Obligor, his Heirs, &c. have paid the same before the Action brought, tho' such Payment was not made strictly according to the Condition, yet it may be pleaded in Bar of such Action, as if the same had been paid at the Day and Place according to the Condition.* The Court being of the same Opinion, *viz.* that the Defendant's Plea was aided, the Motion for a Repleader was denied.

### Thomas ver. Bishop, Mich. 7 Geo. II. B. R.

(116.)  
Assumpsit on  
an Inland  
Bill of Ex-  
change.

**A**ssumpsit by Thomas Indorsee of a Bill of Exchange drawn upon the Defendant Bishop, and accepted by him, "At thirty Days Sight pray pay to Mr. Somerville the Sum of 200 l. and place it to the Account of the York-Buildings Company, as per Advice, Charles Mildmay." And the Bill was directed to the Defendant Bishop, Cashier of the York-Buildings Company, at their House, &c. who accepted the same. P. J. before whom this Cause was tried, directed the Jury to find for the Plaintiff, the Defendant having generally accepted the Bill in his own Name; but at the same Time gave the Defendant Leave to move for a new Trial.

Mr. K. and S. Counsel insisted, that the Defendant was not liable personally, but as Cashier of the Company; and this appears not only upon the Face of the Note, but from the Letter of Advice to which it refers, and which was given in Evidence upon the Trial. For the Note is not only directed to Bishop, Cashier of the Company, but is expressly mentioned to be placed to Account of the Company. The general Acceptance by the Defendant in this Case, can make no Alteration in the Note, so as to charge him personally; for Acceptance must be taken *secundum subjectam materiam*, as Cashier; he is not therefore bound by this Acceptance *in proprio jure*, but in Right of the Company; and this is the general Method of transacting Bills of this Kind. So is the Case of all Draughts upon the Bank, the Note is generally drawn upon the Cashier, without any Mention of the Company, and

and yet there is no Question but the Bank is responsible. The Plaintiff is not without Remedy, the Company is bound by this Acceptance, and he has his Action against them. Whether this Bill was accepted by the Defendant in his own Right, or in Right of the Company, is a Fact proper for the Determination of a Jury; and this is the Circumstance upon which we ground our Motion. Upon the Face of the Bill there is strong Evidence in Favour of the Defendant, that his Acceptance was in Right of the Company; and this is yet much stronger, by Reference to Letter of Advice.

D. Serjeant *cont'*: Whether the Defendant accepted this Bill in his own or the Company's Right, is not now the Question. The Defendant has generally accepted it in his own Name, and that makes him liable *in proprio jure*; any Man may accept: Suppose a Bill drawn upon J. N. it may be accepted by J. S. and by this Acceptance J. S. becomes liable. The Direction to the Defendant as Cashier, &c. is only a proper Addition and Description of his Person. It is said, he accepted it in Right of the Company, and as their Servant; but how can this be known? the Acceptance is general in his own Name. There is no Question but a Servant may have Transactions of his own, and may contract upon his own Account. Bills of Exchange must have a Certainty, the Acceptance reduces it to a Certainty; the Bill is drawn upon Bishop, and he has accepted it in his own Name generally, and the Acceptance alone is sufficient to charge him.

T. C. J. Bills of Exchange are Bills of a particular Nature, arising from the Contract and Transactions of Merchants; the first Contract is by the Drawer, and by that he becomes liable; after Acceptance it is the Contract of the Drawee; and a further Contract may arise from the Person to whom the Bill is payable, by his Indorsment over. But every Writing that is drawn in Form of a Bill of Exchange may not in Fact be so; as where Money is payable out of a particular Fund; and so was the Case of *Jenny and Hale, Trin. 10 Geo. 1.* Plaintiff Jenny sold his Land to the Defendant, who gave him a Bill for the Price or Value thereof in these Words, directed to one Prat, Sir, you are to pay to Mr. Jenny so much, &c. out of the Money belonging to the Governors and Company of Devonshire Miners, &c. the Money not being paid, Jenny brought his Action upon this Note, supposing it a Bill of Exchange; and upon Demurrer Plaintiff had Judgment; whereupon Error was brought in this Court, and Judgment reversed; for the Court held it to be no more than a Direction and Appointment to pay Money out of a particular Fund, and was not a Bill of Exchange. *Vide this Case in Mod. Ca. 266.* And so was the Case of *Joslyn and Lucern, Trin.*



Mr. B. Serjeant *cont.*: The Defendant's Plea is not that the Money was paid before the Day mentioned in the Condition, but the Payment was *ante impetrationem Brevis*, scil. 16 March, which Plea is now aided by the Statute for Amendment of the Laws; and the *Scil.* is immaterial. *Vide Stat. 4 & 5 Ann. c. 16. which provides, that where an Action of Debt is brought upon any Bond which has a Condition, or Defeazance, to make void the same upon Payment of a lesser Sum at a Day or Place certain, if the Obligor, his Heirs, &c. have paid the same before the Action brought, tho' such Payment was not made strictly according to the Condition, yet it may be pleaded in Bar of such Action, as if the same had been paid at the Day and Place according to the Condition.* The Court being of the same Opinion, *viz.* that the Defendant's Plea was aided, the Motion for a Repleader was denied.

### Thomas ver. Bishop, Mich. 7 Geo. II. B. R.

(116.)  
Assumpsit on  
an Inland  
Bill of Ex-  
change.

**A**ssumpsit by Thomas Indorsee of a Bill of Exchange drawn upon the Defendant Bishop, and accepted by him, "At thirty Days Sight pray pay to Mr. Somerville the Sum of 200 l. and place it to the Account of the York-Buildings Company, as per Advice, Charles Mildmay." And the Bill was directed to the Defendant Bishop, Cashier of the York-Buildings Company, at their House, &c. who accepted the same. P. J. before whom this Cause was tried, directed the Jury to find for the Plaintiff, the Defendant having generally accepted the Bill in his own Name; but at the same Time gave the Defendant Leave to move for a new Trial.

Mr. K. and S. Counsel insisted, that the Defendant was not liable personally, but as Cashier of the Company; and this appears not only upon the Face of the Note, but from the Letter of Advice to which it refers, and which was given in Evidence upon the Trial. For the Note is not only directed to Bishop, Cashier of the Company, but is expressly mentioned to be placed to Account of the Company. The general Acceptance by the Defendant in this Case, can make no Alteration in the Note, so as to charge him personally; for Acceptance must be taken *secundum subjectam materiam*, as Cashier; he is not therefore bound by this Acceptance *in proprio jure*, but in Right of the Company; and this is the general Method of transacting Bills of this Kind. So is the Case of all Draughts upon the Bank, the Note is generally drawn upon the Cashier, without any Mention of the Company, and

and yet there is no Question but the Bank is responsible. The Plaintiff is not without Remedy, the Company is bound by this Acceptance, and he has his Action against them. Whether this Bill was accepted by the Defendant in his own Right, or in Right of the Company, is a Fact proper for the Determination of a Jury; and this is the Circumstance upon which we ground our Motion. Upon the Face of the Bill there is strong Evidence in Favour of the Defendant, that his Acceptance was in Right of the Company; and this is yet much stronger, by Reference to Letter of Advice.

*D. Serjeant cont'*: Whether the Defendant accepted this Bill in his own or the Company's Right, is not now the Question. The Defendant has generally accepted it in his own Name, and that makes him liable *in proprio jure*; any Man may accept: Suppose a Bill drawn upon J. N. it may be accepted by J. S. and by this Acceptance J. S. becomes liable. The Direction to the Defendant as Cashier, &c. is only a proper Addition and Description of his Person. It is said, he accepted it in Right of the Company, and as their Servant; but how can this be known? the Acceptance is general in his own Name. There is no Question but a Servant may have Transactions of his own, and may contract upon his own Account. Bills of Exchange must have a Certainty, the Acceptance reduces it to a Certainty; the Bill is drawn upon Bishop, and he has accepted it in his own Name generally, and the Acceptance alone is sufficient to charge him.

*T. C. J.* Bills of Exchange are Bills of a particular Nature, arising from the Contract and Transactions of Merchants; the first Contract is by the Drawer, and by that he becomes liable; after Acceptance it is the Contract of the Drawee; and a further Contract may arise from the Person to whom the Bill is payable, by his Indorsment over. But every Writing that is drawn in Form of a Bill of Exchange may not in Fact be so; as where Money is payable out of a particular Fund; and so was the Case of *Jenny and Hale*, Trin. 10 Geo. 1. Plaintiff Jenny sold his Land to the Defendant, who gave him a Bill for the Price or Value thereof in these Words, directed to one Prat, Sir, you are to pay to Mr. Jenny so much, &c. out of the Money belonging to the Governors and Company of Devonshire Miners, &c. the Money not being paid, Jenny brought his Action upon this Note, supposing it a Bill of Exchange; and upon Demurrer Plaintiff had Judgment; whereupon Error was brought in this Court, and Judgment reversed; for the Court held it to be no more than a Direction and Appointment to pay Money out of a particular Fund, and was not a Bill of Exchange. *Vide* this Case in *Mod. Ca.* 266. And so was the Case of *Joslyn and Lucern*, Trin.



*Trin. 13 Ann.* which was to pay Money out of growing Stock; and these Notes do not make the Drawer liable in case the Stock should fail. It is a general Rule, that the *Acceptor of a Bill of Exchange is personally liable*; how then does this Case vary? the Directions to the Defendant as Cashier, &c. cannot vary it; that is merely a Description and Addition of his Person. The Acceptance in this Case is general, (accepted *June 13. 1733.* and signed *Bishop.*) In all Cases a general Acceptance is *secundum tenorem Bille*; this Bill is drawn upon *Bishop*, and the subsequent Words, *viz.* "Place it to Account of the Company, as *per Advice*," cannot alter the Case, nor make any Difference in the Bill of Exchange; it is only the Method of accounting for the Money between the Drawer and Drawee after it is paid. As to the Letter of Advice, that is not proper Evidence; it is extrin-sical of the Bill, and is always a private Transaction between the Drawer and Drawee, to which the Person to whom the Money is payable is not supposed privy; if Letters of Advice should have any Weight in these Cases, it would be of dangerous Consequence. Bills of this Kind are in their Nature negotiable; and such an Allowance must make them uncertain, and may be attended with ill Consequence in the Case of an Indorsee, who is in Nature of a Purchaser for a valuable Consideration. The Case of *Evans and Camlington*, is stronger than this. *Vide 2 Vent. 307. Carth. 5.*

We must therefore judge of this Case as it stands upon the Face of the Bill, which is a Bill drawn upon *Bishop*, and accepted by him generally, which alone is sufficient to charge the Defendant and make him personally liable.

*P. P.* and *L.* Justices, being of the same Opinion, the Motion was denied, and Plaintiff suffered to have Judgment upon the *Postea*. *Vide Telv. 137. Talbot versus Godbolt*; *G.* gave a Bill in this Form, "Memorandum, that I have received of *E. Talbot*, to the Use of my Master *Serjeant Gaudy*, the Sum of 40 l. to be paid at Michaelmas following". It was held that *G.* was liable, for the Clause of Repayment is general, and not to be repaid by his Master *Gaudy*.

### Evans ver. Thrustout, Mich. 7 Geo. II. B. R.

(117.)  
Variance between the Declaration and Original.

IN Ejectment, Plaintiff declared upon the Demise of *John*, and in the original Writ it was said to be the Demise of *Timothy*; after Verdict for the Plaintiff, it was moved in Arrest of Judgment by Reason of this Variance; and

and said, if in Fact there had been no Original it had been cured by the Verdict, but a bad Original is not cured.

T. C. J. The Demise cited in the Declaration is only by Way of Recital, and the Defendant cannot take Advantage of a bad Original, but upon Oyer or a Certiorari. 2 Salk. 701, 658. Bragg versus Digby, 6 Mod. 28.

The King ver. Dr. Bettsworth, Mich.  
7 Geo. II. B. R.

MR. S. moved for a *Mandamus* to be directed to the (118.)  
Spiritual Court, to grant Administration *cum testamento* *Mandamus*  
*annexo* to Kinnafton, residuary Legatee of K. his Father to the Spi-  
deceased, the Executors having renounced in Favour of the ritual Court to  
residuary Legatee. We have applied to the Spiritual Court, grant Admi-  
and they refuse no Administration till such Time as they have nistrati-  
issued out a Commission of Appraisement, and had a Return. on the Re-  
This is contrary to 21 H. 8. which provides, that *Administra- fidua-  
tion shall be granted with all convenient Speed; and cited the ry Legatee,*  
King and Bettsworth, which was in the Case of Lord Lon- on the Exe-  
donderry's Will, where Executors applied to the Spiritual cutor's re-  
Court for Probate, but the Court refused till a Commission, nouncing.  
Cc. as in this Case; but this Court granted a *Mandamus*,  
and said the Spiritual Court had no Power to stay Probate.

T. C. J. There is a great Difference between the Cases; here the Executors have renounced, and there is no Law ob-  
liges the Spiritual Court to grant Administration to the resi-  
duary Legatee. Shew Cause. Note, That afterwards, upon Denied.  
shewing Cause, the *Mandamus* was denied.

Stephens ver. Loftyn, Mich. 7 Geo. II.  
B. R.

IN Debt upon a Bond the Plaintiff declares the Defendant (119.)  
30 May 1723. by his Bond obligatory, became indebted to Debt by sim-  
the Plaintiff in the Sum of 76 l. 10 s. &c. Defendant *praves* ple Contract  
Oyer of the Bond and Condition, which was for Payment of cannot be set  
38 l. 5 s. upon the first of December next ensuing the Date of off against a  
the Bond, with Interest, &c. and then pleads the Stat. 2 Geo. 2 Debt upon  
which impowers the Defendant to set off mutual Debts in Bond, by  
Discharge of the Action; and avers, that the Plaintiff stood Statute 2  
indebted to him in the Sum of 70 l. 8 s. due upon simple Geo. 2.  
Contract,



Contract, which is more than the Sum mentioned in the Condition. Upon Demurrer to this Plea, Judgment was for the Plaintiff in the Common Bench, whereupon the Defendant brought Error in this Court.

Mr. D. Counsel for the Plaintiff in Error: There are two Exceptions taken to this Plea, 1st, That by this Act of Parliament, Debts upon simple Contract cannot be set against Debts of a superior Nature. And 2dly, That the Penalty of the Bond, not the Sum mentioned in the Condition, is the Debt in Law. As to the first he said, where Debts are mutual, this Act of Parliament is to be considered in Nature of an Extinguishment, according to the Rule laid down in *Wankford's Case*, 1 Salk. 305. where the same Hand that is to receive, and ought to pay, it is an Extinguishment. This therefore may be compared to an Action of Debt upon Bond, where Payment before the Action brought is a good Plea in Bar, by the Statute for Amendment of the Law. It is objected, that this may be inconvenient in Cases of Executors, and work a Devastavit, but the Inconveniences on the other Hand is as great. Suppose an Executor brings Debt upon Bond due to his Testator, who at the same Time stands indebted to the Defendant in the like Sum upon simple Contract, unless the Debt can be given in Evidence in Discharge of the Bond, the Money recovered must go in Discharge of Debts of a superior Nature, and Defendant is without Remedy upon Failure of Assets. This Act of Parliament is a remedial Law, and ought to be construed liberally; it ought to be considered in the same Light with other Acts of Parliament, where mutual Debts are to be set one against the other; as the Bankrupts Act, 5 Geo. 2. all Debts are included; and there is no Distinction between Debts upon Specialties and simple Contracts. In the Case of Retainer by Executor, he is not obliged to plead it, but may give it in Evidence upon Plene Administravit, and the Reason is because it amounts to Payment.

Mr. C. Serjeant *cont.*: The principal Question in this Case is, whether the Penalty or the Sum mentioned in the Condition is the Debt in Law; for if Penalty is the Debt in Law, then the Defendant's Plea is ill; for the Sum to be set off in Discharge is not of equal Value, the Penalty is for 76 l. 10 s. and the Debt upon simple Contract is only 70 l. 8 s. After Forfeiture of the Bond the Penalty is the Debt in Law, and the Condition cannot be given in Evidence. 3 Lev. 368. and so was the Case of the Bank of England and Morrice, Pasch. 6 Geo. 2.

T. C. J.

T. C. J. The Act of Parliament in Question was made for the Benefit of the Defendant, and must be construed in his Favour, so far as is consistent with the Rules of Law. This Act cannot be construed so but Inconveniences will arise upon it either one Way or the other. It is true, in the Case of an Executor it may work a *Devastavit*, and yet on the other Hand, it is hard that an Executor should recover Debts upon Bond due to his Testator, and the Defendant not have it in his Power to set off Debts upon simple Contract, tho' of equal Value in Discharge. *The Rule that is laid down comes too general; suppose an Action is brought for Breach of Covenant, which sounds in Damages, and the Plaintiff at the same Time stands indebted to the Defendant upon simple Contract, which sounds in Damages likewise; it is pretty hard to say that one Debt cannot be set off to discharge the other.* It is said, this Act ought to have the same Construction put upon it with other Acts wherein mutual Debts are mentioned; and for this Reason the Bankrupt's Act is cited; but this Case differs; for by the Bankrupt's Act all Debts are made equal, and therefore no Notice is taken of Priority of Debts; besides, Commissioners of Bankrupts have an Equity in them, *and in Equity all Debts are equal.*

The chief Question is, whether the Penalty is the Debt forfeited by Law? for if so, the Debt pleaded in Bar or Discharge is not equal in Value to the Debt demanded by the Bond, and consequently the Plea is bad; *there is no Question but the Penalty is the Debt forfeited by Law, and therefore the Plaintiff must have his Judgment.*

P. and L. Justices: This Case must be determined as it stands upon Record; and the Question is, whether this Plea is a good Bar? Defendant has pleaded mutual Debts, &c. but the Sum to be set off by his Plea is not equal in Value to the Demand. The Penalty is the Debt forfeited by Law, and no Way to discharge it, *but by pleading Performance.* *The Statute for Amendment of the Law does not extend to this Case; the Statute makes Payment after the Day, and before the Action brought, good Payment in Discharge of the Bond; as Solvit ad diem was a good Bar at Common Law.*

The Defendant's Plea in this Case is not good; and so gave Judgment for the Plaintiff, without giving any Opinion upon the first Objection. Note; *The Law in this Respect is since altered by Stat. 8 Geo. 2. c. 24.*



Ashtell *versus* Beaker & al', Mich.  
7 Geo. II. B. R.

(120.)  
Scire Facias  
against Bail.

**SCIRE** Facias against Bail. Defendants pleaded that no Ca' Sa' was prosecuted and returned ante diem emanationis originalis Brevis de Sci' Fa'.

To this the Plaintiff demurred as an immaterial Plea, for a Ca' Sa' may be returnable the same Day the Sci' Fa' issues; and this has always been held good by the Practice of the Court.

Mr. D. Counsel compared it to the Statute of Limitations, which is always pleaded ante diem exhibitionis Bille, or ante diem impetrationis Brevis. He likewise objected to the Sci' Fa', because it did not appear the Plaintiff had prayed Execution, and without Prayer he cannot have Execution; and cited 1 Rol. Abr. 894. 3 Mod. 252.

T. C. J. The Plea is immaterial, because the Ca' Sa' may be returnable the same Day the Sci' Fa' issues, which is agreeable to the Practice of this Court; and therefore the Pleading must be ante emanationem Brevis, &c. the Reason for Pleading the Statute of Limitations in that Manner is, because those are the Words of the Act of Parliament.

P. P. and L. Justices, being of the same Opinion, Judgment was for the Plaintiff, unless Cause, &c.

Warrener *versus* Thrustout, Mich.  
7 Geo. II. B. R.

(121.)  
Ejectment.

**I**N Ejectment. Mr. Common Serjeant moved to amend a Declaration, which was for several Messuages and three Acres of Ground; the Amendment prayed was to strike out the Word (Ground), and instead thereof to make the Declaration for three Acres of Arable Land; and cited a Case 2 Geo. 2. where the Plaintiff declared *de Messungio sive Tenemento*; and upon Motion Leave was given to strike out the Words (*sive Tenemento*); and both this and the original Case was before Appearance.

Cur': To strike out the Words (*three Acres of Ground*), and add others which are of a different Nature, is altering the Demise, and therefore denied the Motion; but gave Leave to strike out three Acres of Ground.

Whiteham, *Qui tam*, and Jokeham,  
Mich. 7 Geo. II. B. R.

Information *Qui tam*, &c. for buying and selling Sheep in (122.)  
the same Market, contrary to 5 & 6 Ed. 6. c. 14. To Information  
quash this Information two Objections were taken. 1<sup>st</sup>, Be *Qui tam*,  
cause no Affidavit was made by the Person who commenced  
the Prosecution before the Issuing of the Information, that  
the Offence was committed in the same County where the  
Suit is commenced. *Vide* 21 Jac. 1. c. 4. No Officer or Mi-  
nister in any Court of Record shall receive, file or enter of  
Record any Information, &c. until the Informer or Relator  
has first taken a Corporal Oath before some of the Judges  
of that Court, that the Offence laid in such Information, &c.  
was committed within a Year, and within the same County  
where such Information was commenced. The second Excep-  
tion was, that the Fact was laid subsequent to the first Day  
of the Sessions.

Mr. L. Counsel insisted, that this Information could not be  
quashed upon Motion; Informations *Qui tam* are in Nature of  
Civil Actions, and no Instance that a Civil Action was ever  
quashed upon Motion. 1 Inst. 139. The Objection is, that no  
Affidavit appears upon Record; but that does not make the  
Information void, the Words of the Act are, That no Infor-  
mation shall be received, filed or entered of Record, &c. so  
that altho' the Proceedings are irregular, the Information may  
well stand. *Carth.* 503. *Salk.* 376. No Information shall be  
received or filed before Recognizance given by the Informer  
to prosecute with Effect, &c. Stat. 4 & 5 W. 3. c. 18. and that  
it was held upon Construction of this Act of Parliament, that  
in Case no Recognizance be given, the Information is not  
void, but Process thereon must be set aside. But in this Case  
the Act of Parliament has been complied with; for here  
Affidavit has been made by the Relator, which is agreeable to  
the Words of the Statute; and in this Case it is reasonable;  
for this is a Prosecution upon a penal Statute, and if the In-  
former was to make Affidavit, he could not be an Evidence to  
convict the Offender. But admitting the Oath in this Case  
not sufficient, the Court will not quash the Information, but  
where Exception appears upon the Face of the Record; and  
no Advantage can be taken of this upon Error, or Demurrer  
to the Declaration. 4 Inst. 272.

As to the second Objection, he said this Case was like the  
Case of all special Memorandums; for altho' all Declara-  
tions



tions are in Fiction of Law supposed to be entered on the first Day of Term, yet a special Memorandum alters the Case, and ties it down to the Day mentioned in the Declaration. Sessions commenced 11 Jan. but by Adjournment were continued to 12 Feb. on which Day the Offence was committed.

*Cur:* The Information cannot be quashed upon Motion, and so it is said in Salk. 372. There is a Difference between a Motion to quash and set aside. If an Information be filed without Affidavit, the Court may stay Proceedings, or order it to be taken off the File. The Answer which is given to the first Objection is very material; for in Prosecutions upon Penal Statutes, the Person who appears to be the Informer upon Record, cannot be a Witness; and therefore Distinction may be made in this Case between Informer and Relator; before this Act of Parliament the Informer never appeared upon Record, and so was always admitted an Evidence.

The whole Court being of this Opinion, the Rule was discharged, but principally for the first Reason, viz. That in Motions to quash Informations, no Advantage can be taken but where the Exception appears upon Record. Note; Proceedings are carried on in the same Manner upon 12 Ann. c. 16. sect. 2.

### Smith versus Boucher & al', Mich. 7 Geo. II. B. R.

( 123. )  
Assault and  
false Imprisonment.

**A**CTION of Assault and false Imprisonment *ad damnum* 1000*l.* Defendants justify and say, that the Chancellor and Scholars of the University of Oxon, from the Time whereof the Memory of Man is not to the contrary, were a Body incorporate by Name, &c. and that there now is, and Time immemorial has been, a Court held before the Chancellor, his Commissary, &c. on Friday in every Week, for Determination of all personal Actions whatsoever between the Parties, (one of them being a Scholar of the said University, or Person having the Privilege thereof); and that Time immemorial it has been customary on the personal Complaint before the Chancellor, his Commissary, &c. of any Person having Privilege of the said University, that he has an Action personal of Damages against any Person then being within the Precincts of the said University, such Complainant making his Corporal Oath before the Chancellor, &c. of such Damages, and that he believes that such Defendant, upon his being cited, will not appear, but rather run away out of the Precinct of the said University. For the Chancellor to decree

creed a Warrant to be made, in Writing for the arresting and taking the Body of such Defendant and detaining him in Prison, until such Defendant should put into the said Court sufficient Security for answering the Complaint. And the Defendants further say, that by Letters Patent bearing Date 1 April, 14 H. 8. the said Customs and Privileges were confirmed, which said Letters Patent were afterwards Anno 13 Eliz. published and confirmed by Act of Parliament. And the Defendants further say, that before the Time when, &c. the said James Boucher made his Complaint before the said Deputy Commissary, that he had an Action personal of Damages against the Plaintiff, then living within the Precincts of the said University; and then and there did alledge that he was damnified in the Sum of 1000 l. and that he did suspect that the said Defendant would run away and not appear, if cited according to the Belief of the said James Boucher; and that then and there the said James took his Corporal Oath of the Truth of the Premises in Manner aforesaid; and the said Judge then and there decreed a Warrant to be made as was required. Whereupon the said Hugh Smith, Plaintiff in the present Action, was arrested and carried to Prison for Want of sufficient Sureties, &c. which are the same Assault and Imprisonment as is complained of, &c.

Plaintiff replies, there was no Affidavit of the Cause of Action filed as the Statute directs; and to this the Defendants demurred. Vide 12 Geo. 1. c. 29. and 5 Geo. 2. c. 27.

C. Serjeant: The Replication is bad, for the Act of Parliament does not make the Process void; but the Words are, "That the Defendant shall not be held to Bail, unless Affidavit be made that the Cause of Action is 10 l. or upwards"; so that want of Affidavit does not avoid the Process, but subjects the Party to an Action. In no Case the Process is in it self void, but where it is expressly provided so by Act of Parliament; as in 7 Ann. c. 12. Process against Ambassadors and their Servants for Debt is declared void.

H. Serjeant cont: Jurisdiction is not to be presumed in inferior Courts, it is therefore incumbent upon them to shew they have a Jurisdiction; but does this appear in the present Case; they have set forth a Custom to hold Pleas in all personal Actions, and say, that B. made Complaint that he had a personal Action; but the Nature of that Action is nowhere shewn. They ought to have described the Action and Nature of it, or this Court will not intend it to fall within their Jurisdiction. *Hale's Plac. Cor.* 35, 36. *Moore* 275.

But suppose the Description is so certain as to give a Jurisdiction, yet such a Custom as is here pleaded is a void Custom. Here is a Custom pleaded to issue Warrants to arrest



and detain in Prison till Security be found; but it does not appear that Process in these Cases has any Return, and so *Cap.* void, as in 23 *H. 6.* All Warrants of *Cap.* must have a certain Return. *Dyer* 175. p. 23. Every *Cap.* ought to be returned the ensuing Term, for the Mischief which might otherwise befall the Prisoner to be kept always in Prison. *Cro. Eliz.* 467. *Nettor and Sharp.* The Reason of these Resolutions is *in favorem libertatis*, which is always favoured in Law; and tho' it appears by Plea, that a Return was made, yet a Return cannot make good a void Process. There is another Reason which makes this a void Custom; because a *Cap.* issues in the first Instance, without any previous Summons, and so is 1 *Mod.* 236. *Hall ver. Booth.* It is against Law for any inferior Court to issue *Cap.* for the first Process; for the Liberty of a Man is highly valued in Law, and no Man ought to be abridged of it, without some Default in him. It is against the Course of the Law, and all Courts. 1 *Roll. Abr.* 563. p. 11. *If this is a void Custom in itself, Confirmation by Charter or Act of Parliament will not avail; for Stat. of Eliz. is only a general Confirmation, i. e. of all reasonable Customs, but does not make that of Force, which before was void in itself.* 1 *Inst.* 381. And so it was held, 1 *Salk.* 203. That tho' the Customs of London are confirmed by Act of Parliament, yet those Acts extend only to good Customs; and bad Customs are void, and cannot be confirmed. *Plow.* 399. b. *Hob.* 85, 86, 87.

C. Serjeant, in Reply, agreed, that unless it did appear that inferior Courts had a Jurisdiction, the Process was void; but here is sufficient set forth to give a Jurisdiction. The Custom, that upon Complaint made that the Plaintiff has a Personal Action, and suspects the Defendant will run away, Warrant shall issue; so that we have followed the Custom in our Plea. It is said that Custom is void, because contrary to Law; so are all Customs: And, in many Cases, Customs not strictly maintainable in themselves have been supported and made effectual by Act of Parliament. By Custom, Serjeant of the Mace in London, upon Complaint of Debt entered in any of the Counters against Defendant, may arrest him by Parol, and carry him to Prison; and this is a good Custom, and yet much stronger than the present Case. *Cro. El.* 196. *Gerard ver. Dickenson.* So in *Dyer* 229. p. 30. Use of a Freehold Messuage in London may pass by Bargain and Sale made by Parol only. Custom of London, that where Contract is made between Citizen and Citizen for Payment of Money, and he who made Contract dies, his Executors or Administrators shall be chargeable therewith, as if it were upon an Obligation. *Cro. Eliz.* 409. So that the Debtor may be arrested before the Debt becomes due, to compel him to give Security. 2 *H.* 4. 12.

T. C. J. There are two Objections made to the Defendant's Plea; that no Affidavit was made of the Cause of Action before Issuing the Process; and that this is a void Custom. There are a great many Cases, where general Words of an Act of Parliament do not extend to Customs, but that is where the Words are in the Affirmative only; as in *Magna Charta*, it is said Court-Leets shall be held but twice a Year, viz. at *Easter* and *Michaelmas*; and yet Custom to hold at different Times is good. But, in the present Case, here are negative Words; and it is generally held in those Cases, that Customs are included. Suppose therefore this Act of Parliament does extend to inferior Jurisdictions, and no Affidavit is made before Issuing out the Process, the Judge, the Officer and Gaoler will not be subject to false Imprisonment. That is carrying the Construction of the Act of Parliament too far, for there are no Words to make the Process void. I don't say, in this Case no Action will lie, *but it must be against the Party only*. Where a Court has an original Jurisdiction, tho' the Proceedings are not strictly regular in Pursuance of that Jurisdiction, yet the Judge and Officer who execute that Process are not liable. *And to this Purpose, see a notable Case in 2 Lutw. 937, 1560. for the Process in those Cases is not void, but erroneous only.*

It is objected, here is a Justification out of an inferior Court, by a *Capias* without Summons, which is said to be void, and that no Custom can support it; *but such Process surely is not void, but voidable only. And in Mackally's Case, 9 Rep. 68.* This Process by Custom of *London*, which is confirmed by Act of Parliament, is held to be good. *Vide 2 Lutw. 1565.* This Construction may go a great Way in the present Case, for the Customs of the University are confirmed in Parliament. It is true, an Act of Parliament cannot confirm Customs void in themselves; but the Parliament may confirm Customs which perhaps could not support themselves.

P. J. The Question is, Whether the Proceedings are void, or voidable? There is no Doubt but where the Court has an original Jurisdiction, Error in Proceedings does not make the Process void, but erroneous only: *As Service of Process out of Jurisdiction, the Process is not void in that Case.* The Act of Parliament requires, that Oath shall be made of the Cause of Action, and whether this is not a Condition precedent to the Jurisdiction, requires further Consideration.

P. J. General Confirmation will not establish Customs inconsistent with natural Justice: Here the Custom is; the Party must make Complaint of his Cause of Action, and must verify by Oath the Certainty of Damage; but, in the present Case, he only swears he is damaged, &c. as he believes; which

is



is not sufficient; but this Defect does not make the Process void: For where the Defendant is arrested upon a Process at Law, and there is a Defect in Affidavits, that does not vitiate the Process, but this Court will discharge the Defendant upon his common Appearance; but neither Judge, nor Officer who executes the Process, are liable to an Action.

L. J. The Question in this Case is not so much to the Custom, for that does not seem unreasonable, for Process is not to issue, but upon Complaint and Oath of the Plaintiff; but whether the Defendants had brought themselves within this Custom. A *Cap.* without a *Sum.* as this Case is pleaded, is not unreasonable, for it does not issue but upon Oath that the Defendant upon Citation will not appear, and surely a Summons in such Case must be needless. The Act of Parliament requires, that an Oath shall be made that Cause of Action amounts to 10 *l.* or upwards; but the Omission of such Oath does not affect the Jurisdiction. *The Doubt that I have is, whether here ever was any Jurisdiction, which extends only to personal Actions?* How does this appear to be a personal Action? *They ought to have shewn the Nature of the Action, that this Court might judge, whether within Jurisdiction, or not?* In all Cases where Persons who hold Plea, have Power and Jurisdiction, tho' the Process thereupon be erroneous, yet it is not void, but voidable. But where a Court awards Process, without having an original Jurisdiction, it is utterly void. As if Justices of Common Pleas should hold Plea upon Appeal, the Process and Proceedings are utterly void, and the Officer who executes the Process is a wrong Doer. *Vide Moore 275.*

T. C. J. That is because the Court has no Jurisdiction as to the Nature of the Action: But here is a Jurisdiction only irregular in executing it. The Stat. 21 Jac. 1. c. 4. is that, before Information filed or received, an Oath shall be made, &c. but where Information is filed without Oath, the Proceedings are not void, but voidable. *Stands over.*

### Middleton & Ux' versus Crofts, Mich. 7 Geo. II. B. R.

( 124. )  
Libel.

**L**IBEL exhibited against the Plaintiffs in the Spiritual Court for a clandestine Marriage. Several Facts were charged in the Libel, viz. *That the Parties were married without Licence or Publication of Banns; that the Marriage was at uncanonical Hours, between one and three o'Clock in the Morning, and in a private Dwelling-house.* Upon Motion for a Prohibition, the Plaintiffs suggested, *That they could have proved the Marriage by one competent Witness; and that they had a regular Licence,*  
but

but that the Spiritual Court refused to admit the Evidence of one Witness only. The second Suggestion was, That by Stat. 7 & 8 W. 3. this was made a temporal Offence, with Penalty of 10 l. to be recovered against any Man so married without Licence or Publication of Banns. Andrews D.L. argued against the Prohibition; and, in the first Place, He admitted, that where Ecclesiastical Courts have an original Jurisdiction, and an Incident happens which is of temporal Conuzance, they shall try the Incident, but shall try it as Courts of Common Law would. But where the Ecclesiastical Court proceeds in a Matter merely Spiritual, if they proceed in their own Manner, tho' contrary to the Form of Proceedings at Common Law, no Prohibition lies. In this Case, it is not necessary for the Defendants to produce one Witness, for Proof lies on the Part of the Promoter of the Suit; he exhibits the Libel for a clandestine Marriage, and therefore it is incumbent on him to prove the Marriage. As to the Licence, there is no Proof at all necessary, that must be under the Hand and Seal of the Ordinary; and in those Cases *Index loquitur per Sigillum*. The single Question therefore is, whether the Ecclesiastical Jurisdiction is taken away in these Cases by Stat. 7 & 8 W. 3. This Act of Parliament respects the Revenue only, and Penalty therein for marrying without Licence, and is not given as a Punishment for clandestine Marriage, but to prevent Fraud in depriving the Crown of Duties given for licensing Marriages. And therefore, in all Cases where there is a License or Publication of Banns, the Act is satisfied, tho' ever so irregularly obtained, and no temporal Punishment for Irregularity, which is an Offence in the Spiritual Court, and there only punishable. It is held in *Lindw.* That a clandestine Marriage subjects all Parties, even Witnesses themselves, who are voluntarily present, to Excommunication; which is the Reason that in Prosecutions of this Nature the Witnesses are absolved *ratione testificandi*. Vide *Construction of Archbishop Sancroft, and confirmed* 25 H. 8. c. 19. Sect. 7. Canon 101. *Marrying at uncanonical Hours prohibited.* Canon 102. *Marriage in private Dwelling-houses.* Can. 105. *No Licence to be granted where either Parties are under Age, but by Consent of Parents, &c. and every Licence otherwise granted void, and Parties punishable.* In this Act of Parliament no express Words to prohibit the Jurisdiction of the Spiritual Court, and tho' no particular Saving, yet the Jurisdiction is not destroyed but by express Words, as in Case of Tithes, 23 H. 8. c. 2. 2 & 3 Ed. 6. c. 13. because no exclusive Words, Jurisdiction remains. So 22 & 23 Car. 2. c. 10. which gives Directions concerning Distribution; Proceedings thereon may be by Bill in Equity, and yet no Doubt but Spiritual Courts have a Jurisdiction



*in those Cases.* In Case of Pluralities, where any Ecclesiastical Person holds two Benefices with *Curo simul & semel*, the Spiritual Courts have a Jurisdiction which is not taken away, by 21 H. 8. for that Statute extends only to Cures of the Value of 8 l. *per Ann.* so that there may be a Plurality within the Statute, and a Plurality by the Canon Law. In the like Manner, 21 H. 8. c. 13. enjoins Residence upon Forfeiture of 10 l. Here is a Penalty inflicted, and no Saving to preserve the Jurisdiction of Ecclesiastical Courts; but because no negative Words to restrain the Jurisdiction, it still remains an Offence punishable by Ecclesiastical Law. The Jurisdiction of Ecclesiastical Courts in Cases of this Nature are vindicated by Reason of the Common Law, as in Cases of Nuisance indictable at Common Law, tho' a new Penalty be inflicted, yet the Punishment at Law remains. So at Common Law an Indictment lies for an Assault and Battery; and an Action will lie also for the same Assault. In all these Cases it may be objected, that the Defendant suffers twice for the same Offence, but the Punishment is *diversis rationibus*, tho' 9 Ed. 2. *Articuli Cleri*, gives an Action *de violenta iniectione manuum in Clericum*, and yet the Ecclesiastical Courts may excommunicate the Offender. 2 Inst. 620. *Articuli Cleri*. c. 3. And the Reason is given, 2 Inst. 622. c. 6. for that the Proceedings in both Courts are *diverso intuitu*: As if one lay violent Hands on a Clerk, *pro salute anime*, shall injoin him Penance in the Spiritual Court, and the Clerk may have his Action, and recover Damages at Common Law for the Injury. So the Case of Slader and Smallbroke, 1 Lev. 138. A Layman forged Orders, and obtained a Benefice, for which he was prosecuted in the Ecclesiastical Court, and Order for Deprivation; and he prayed Prohibition, because Forgery is triable at Common Law: But Prohibition was denied, for the Forgery was touching an Ecclesiastical Matter, and he is sueable there for it, in Order to his Deprivation only. Hil. 16 Car. 2. Kerby and Savile. Prosecution in the Spiritual Court for calling the Defendant Bawd; R. moved for a Prohibition, suggesting that K. had brought his Action at Common Law, and recovered; but the Prohibition was denied, because the Proceedings are *diversis rationibus*, the one for Damages, and the other *pro Salute anime*, & *pro reformatione morum*. The present Case comes within the Reason of all these Cases. The Prosecution upon Stat. 7 & 8 W. is for defrauding the King of his Stamp-Duty, but in Ecclesiastical Courts the Proceedings are *pro Salute anime*, both Courts proceed *diverso intuitu*, and therefore a Prohibition ought not to be granted. 5 Rep. 5. b. *de jure Regis Eccles.*

Mr. S. Counsel on the same Side. This is a Prosecution for a clandestine Marriage, and the Charge consists of four Particulars; That it was without Licence or Publication of Banns; was performed at uncanonical Hours, and in a private Dwelling House. The Foundation upon which a Prohibition is moved for, stands singly upon Stat. 7 & 8 W. 3. For, as to the first Suggestion, there is no Affidavit to support it, and therefore the Court can take no Notice of this Case, but as it appears upon the Face of the Libel. It is said, that Prohibition ought to go, because a Penalty being given by the Statute, this is now become a Temporal Offence, and Jurisdiction of the Spiritual Court is by this Means taken away. But supposing the Objection to have that Force which is contended for, it can extend no further than the Penalty reaches, and that is to the Husband alone: Besides, the Suggestion extends only to Part of the Libel, for the Penalty given by Statute is for marrying without Licence only; whereas the Prosecution in this Case is not only for marrying without Licence, but for marrying at uncanonical Hours, and in a private Dwelling-House, which are Offences not within the Act of Parliament, and the Penalty given by the Act is not proportionable to the Offence, but adequate to secure the Duty arising from the Stamp to the Crown. There are many Cases where Common and Canon Law have concurrent Jurisdictions, and it has been held, even in the Case of a Custom, that Suit may be in the Spiritual Court, as in 1 Sid. 146. 1 Vent. 3. Fitz. Nat. Brev. 51. If Pension is due by Prescription, it is at the Election of the Party either to sue at Common Law or in the Spiritual Court, contrary to the Opinion of Lord Coke, 2 Inst. 491. So a Man may have an Action pro bonis asportatis cum uxore, and at the same Time the Defendant may be libelled in the Spiritual Court for Adultery, because the Proceedings are diverso intuitu. So in the Case of Townsend versus Thorp, Hil. 12 Geo. 1. The Plaintiff was indicted at Common Law for Drunkenness, & alia enormia crimina, and at the same Time libelled against in the Spiritual Court, in Order to Deprivation; and tho' in that Case the Court did stay Proceedings upon the Libel, pending the Indictment, yet afterwards Consultation was granted.

C. and G. Counsel e cont'. We have no Affidavit to verify the first Suggestion, and therefore that must be given up: But, as to the second, they insisted, that this was not an Offence punishable in the Spiritual Court. It may be an Offence in the Parson who marries, but can be none in the Parties married. As to the Canons of 1603, they do not bind the Laity, for they have neither been read in Courts of Common Law, nor confirmed by Act of Parliament. Vide Gibson's Codex,



dex, 2 Salk. 672, 412. But supposing Spiritual Courts had a Jurisdiction in these Cases, that Jurisdiction is now taken away by Stat. 7 & 8 W. 3. which has made this a temporal Offence, and inflicted a Penalty upon the Party offending. This Statute gives the Sum of 10 l. to be recovered against the Man marrying without Licence, and so far at least the Ecclesiastical Jurisdiction is gone, and tho' this Penalty does not reach all the Facts charged in the Libel, yet their Jurisdiction being gone, as to Part, the Prohibition must go to the Whole, as in Hob. 192. Berrie's Case. In this Act of Parliament here is no particular Saving of the Jurisdiction of Spiritual Courts; and in all Cases where the Common Law or Statute gives a Remedy *in foro seculari*, whether the Matter be Temporal or Spiritual, the Conuzance of that Matter belongs to the King's Temporal Courts only, unless the Jurisdiction of the Spiritual Courts be saved by that Statute which gives the Penalty. 2 Salk. 673. And for this Reason, 10 Ann. c. 19. in a Clause to prevent clandestine Marriages, the Jurisdiction of Spiritual Courts is particularly saved: So in 1 Jac. 1. c. 11. To prevent Persons from marrying during the Life of the first Husband or Wife. 1 Eliz. c. 2. Act of Uniformity. 13 Eliz. c. 5. Of Usury. 31 Eliz. c. 6. Of Simony. 4 Jac. 1. c. 5. Of Drunkenness. And in many Cases where Acts of Parliament have imposed further Penalties in Ecclesiastical Offences, there is a Saving added for Jurisdiction of Ecclesiastical Courts. 2 Salk. 672. It is said, where Spiritual Courts proceed *diverso intuitu*, the Jurisdiction remains: But why? Because in these Cases the Common Law gives no Remedy. As in 1 Lev. 138. where a Layman forges Orders, the Spiritual Court may proceed to Deprivation; so in the Case of Townsend versus Thorp, for Deprivation cannot be in those Cases by the Common Law. Libel in Spiritual Court for Adultery; and in that Case no Prohibition lies, because no Punishment at Common Law for Adultery. 2 Inst. 488. These are called *merè Spiritualia*. Where a Libel is in Spiritual Court for calling the Prosecutor Bawd, no Prohibition, because not actionable at Common Law. But in all Cases where there is a Remedy given by Common or Statute Law, and no Saving of the Ecclesiastical Jurisdiction, the Conuzance of that Cause belongs to the King's Temporal Courts only. Vide 1 Inst. 96. Sir Tho. Jones 131.

T. C. J. The Libel in Question consists of several distinct Facts. It is for a clandestine Marriage, without Licence, at uncanonical Hours, and in a private Dwelling-House. These are not Circumstances merely descriptive of a clandestine Marriage, and constituting one and the same Offence, but a distinct Judgment may separately be given upon each. To marry  
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under all these Circumstances was no Offence at Common Law, and are only made so by the Canons of 1603. *But these Canons have neither been confirmed by Parliament, nor allowed in Courts of Common Law; and Canons oblige not the Laity, without Consent of Civil Legislative Power.* There are two Questions; 1<sup>st</sup>, Whether Bishop *Sancroft's* Constitution, which condemns clandestine Marriages, be confirmed in Parliament? And, 2<sup>dly</sup>, If the Jurisdiction of the Spiritual Court is not taken away by 7 & 8 W. 3? It is a general Rule, that where a Remedy is given by Common or Statute Law in the King's Temporal Courts, whether the Matter be Temporal or Spiritual, the Ecclesiastical Courts have no Jurisdiction, except there be a Particular Saving in the Statute for that Purpose. But this Rule is not to be taken in an unlimited Sense; for where the Proceedings are *diverso intuitu*, the Ecclesiastical Court shall not be prohibited. The 7 & 8 W. 3. seems to be made with a particular Regard to the Revenue only, and the Words of the Act are very strong; "*For the better Ascertaining, Levy- ing and Collecting the said Duties on Marriages and Li- cences, be it enacted, &c.*" And then follows the Penalty for a Marriage without Licence, or Publication of Banns, but no Mention of a clandestine Marriage. *This is a Matter of great Consequence, and ought to be well considered before we give Judgment. It is therefore proper to grant a Prohibition to declare upon, in Order to bring this Point before the Court by Way of Demurrer.* Vide *Carthew*. Prohibition to stay a Suit in the Spiritual Court against a Schoolmaster for keeping a School without Licence pursuant to the Statute, upon a Suggestion that the said Statute gives a Penalty of 40 s. *per diem* against every such Schoolmaster; and that by Law *nemo puniri debet bis pro uno delicto; & per Cur'*. A Prohibition was granted. *Carth. 464.* Upon the like Motion it was held, that the Spiritual Court might proceed to punish, but not for the Penalty. Adjournatur.

## Carey versus Hinton, Mich. 7 Geo. II. B. R.

**T**Respass Quare Clavum fregit. Defendant, as to the Force (125.) and Arms, pleads Not guilty; and as to the rest of the Trespas he justifies, and says, That the Locus in quo, &c. was his own proper Lands, and that he entered in to them as such. Plaintiff replies, That Locus in quo was his Estate of Inheritance, and his own proper Lands, and so  
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heritance; not sufficient to maintain the Action.



concludes to the Country. Mr. K. moved in Arrest of Judgment, because the Issue was immaterial. The Replication is, that the Locus, &c. was the Estate of Inheritance of the Plaintiff; but that is not sufficient to intitle him to this Action: The Plaintiff may have an Estate of Inheritance in the Lands; he may have a Remainder or Reversion in him; but to intitle him to this Action, he must have a possessory Property. Mr. D. contr. The Issue is not immaterial, but unformal, which is aided by the Statute of Jeofails, as 5 Rep. 43. Nicholl's Case. 2 Bulst. 41. Moore 464. 1 Sid. 289.

T. C. J. If this Issue should be aided by the Verdict, it will overturn all Certainty in Pleading. The Replication is, that this is the Estate of Inheritance of the Plaintiff, which may be true, and yet the Plaintiff not intitled to this Action: He may have the Reversion or Remainder in him, which is not such an Estate as will support this Action. The Replication indeed does go something further; and avers these to be the proper Lands of the Plaintiff, but that imports no more than a Property in Lands, not a possessory Property to intitle him to this Action, but may be a Property in Remainder or Reversion.

P. J. The Issue is immaterial; he has not pleaded it as his Freehold and Inheritance, but that the Locus in quo, &c. is his Estate of Inheritance. He ought to have pleaded liberum Tenementum; but that cannot be supplied and aided by Verdict.

L. J. Liberum Tenementum means a Right of Entry, and may be given in Evidence upon Not guilty. If the Words in the Replication would amount to the same Construction as liberum Tenementum, there is no Question but it had been good; but the Words import no more than a Property in the Lands, which may be in Reversion; but does not go so far as to shew Possession, or Right of Entry in the Plaintiff.

P. J. Dissentient, Adjournatur.

## Shark versus Dilks, Mich. 7 Geo. II. B. R.

(126.) **N**O Rule to plead necessary, where the Defendant has Time given him to plead by Rule or Order. **M**R. M. Counsel moved to set aside Judgment for Irregularity; and the Objection was, That the Plaintiff had signed Judgment without giving a Rule to plead. The Defendant had applied for further Time to plead, and by Consent had further Time given. The Defendant did not put in his Plea at the Time agreed, and thereupon the Plaintiff signed Judgment; et per Cur. Where further Time is given, a Rule to plead not necessary; and so denied the Motion.

Boucher

Boucher ver. Lawson, Mich. 7 Geo. II.  
B. R.

**T**HE Defendant was arrested at the Suit of the Plaintiff (127.) in the Sum of 363 l. Mr. B. moved to discharge him upon common Bail; and upon Affidavits the Case appeared to be this: The Plaintiff's Correspondent at Lisbon, 5th Nov. Inst. shipp'd on Board the Ship Little Job, John Fletcher Master, (whereof the Defendant then was and now is sole Owner) Goods to the Value of 363 l. being Moidores, which the said Master undertook to deliver to the Plaintiff, &c. But the Defendant says, he gave no Authority to receive the same, for that the Goods being contraband Goods, his Ship was liable to be forfeited. John Fletcher did not deliver the Goods according to Promise; whereupon the Plaintiff brought his Action against the Defendant, Owner of the Ship, supposing him answerable for the Undertaking of his Servant. Mr. B. insisted upon 12 Geo. 1. That Oath to be taken of the Cause of Action must be positive; whereas, in the present Case, the Plaintiff had only swore that John Fletcher Master, or Defendant the Owner, were indebted to him in the Sum of 363 l. which is in the Disjunctive and uncertain. That Moidores being contraband Goods, it was unlawful in his Servant to receive them, and therefore the Master not liable.

Owner of a Ship held to Bail for the Default of the Master, on an Affidavit in the Disjunctive.

That no Action will lie in this Case, but Trover, or a special Action on the Case for not delivering Goods according to Agreement, and in both these Cases the Writ must be mark'd, or the Defendant cannot be held to special Bail; and compared it to the Case of Hughes versus Strout, which was adjudged this Term. This was an Action for Breach of Covenant, and 100 l. Damages laid. The Defendant moved to be discharged upon common Bail, and so ruled by the Court, because no Allowance by a Judge to have the Writ mark'd.

Mr. S. Counsel cont: We have not declared yet, so the Defendant cannot say what Action may be brought. We may bring Assumpsit, and in that Case the Defendant must find special Bail. Vide 2 Salk. 440. Boson versus Sandford. Assumpsit lies against the Master for the Undertaking of his Servant. In the principal Case the Motion was denied, and the Defendant ordered to find special Bail.

Pasch. 8 Geo. 1. Laws versus Colton. In Trover the Defendant was held to special Bail. W. mov'd to discharge him upon filing common Bail, because the Writ was not mark'd. The Motion was opposed. Sed per Cur. He must be discharged upon common Bail.

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The King *ver.* Dr. Bettesworth, Mich.  
7 Geo. II. B. R.

(128.) *Mandamus to grant Administration on the Widow's Renouncing.* EARL of Suffolk died intestate, leaving his Wife the Countess, and a Son, the present Earl of Suffolk. The Countess renounced Administration in scriptis by Proxy, and thereupon the Earl applied to the Spiritual Court for Administration, but was refused till such Time as the Countess had exhibited an Inventory of all the Goods belonging to the deceased Earl in her Possession, whereupon the present Earl applied to this Court for a *Mandamus*.

Dr. F. In Opposition to the Motion, insisted the Renunciation of the Countess was *enter'd by Surprise*; for before the Renunciation, a *Caveat* had been entered by the Creditors; and it is a Rule in Ecclesiastical Courts, that after a *Caveat* no Act can be done, neither in Granting or Renouncing Administration before the *Caveat* be withdrawn. So that in this Case the Renunciation is admitted, yet being by Surprise, and not *de jure*, no Reason to compel the Spiritual Court to grant Administration to the Son. What is insisted upon in the Prerogative Court is only according to the Practice of that Court; a Renunciation in Person is never admitted, but upon Oath that the Person renouncing has not imbezilled the Effects of the Intestate. And this is in Favour of Creditors. The Spiritual Court has not absolutely refused Administration, but only till the Countess brings in an Inventory.

Mr. M. Counsel on the same Side, The Renunciation was admitted by Surprise, without Notice to the Creditors. The Manner of admitting Renunciation in that Court is, upon Oath that the Person renouncing has not diminished the Goods of the Intestate, and upon Consideration of exhibiting an Inventory of the Goods of the Intestates in their Hands. *Mandamus's* in these Cases are founded upon 21 H. 8. c. 5. which leaves a Discretion in the Spiritual Court to grant it to the Widows or next of Kin, but in no Case was Administration granted to the next of Kin, but upon Condition to bring in the Widow; and in those Cases Administration is never granted before the Widow brings in an Inventory. The Practice of every Court is the Law of every Court, and this Court will take Notice of it.

T. C. J. The *Mandamus* must go; the Act of Parliament is express, that Administration must be granted to the Widow or next of Kin: When therefore the Widow renounces, the next of Kin is intitled *ex debito justitiæ*.

There is no Question but Creditors may enter Caveats, but that is only to take Care that Security be given. The Spiritual Court will grant Administration upon the Countess's Exhibiting an Inventory; but when will that be? This is not compulsory upon the Countess to exhibit. Supposing therefore she should never exhibit, it seems unaccountable that this should prevent the next of Kin from having Administration.

If the Effects of the Intestate are imbezilled, the Administrator must take Care of that; he is intitled both in Law and Equity, and the Countess is accountable to him. But it is said always to be the Practice of Ecclesiastical Courts to have an Inventory, and therefore this Court will not interpose. This Objection is over-ruled every Day. In the Case of Lord Londonderry, the Spiritual Court denied Probate before Commission of Appraisement was returned: And it was argued that this was the constant Practice of the Court; but where the Practice is contrary to the Rules of Law, this Court pays no Regard to it.

P. and L. Justices, being of the same Opinion, the Mandamus was granted.

Mason versus Eall, Mich. 7 Geo. II.  
B. R.

ASSUMPSIT, and Verdict for the Plaintiff. Mr. P. assigned for Error, that the Proceedings being partly in Latin, and partly in English, the Judgment was erroneous, as in Comb. 50. Cro. El. 85. Declaration was in English; whereas, by 36 Ed. 3. c. 15. all Entries are to be in Latin; and altho' it was said the Custom there was so used, yet this cannot be good against a Statute.

(129.)  
Proceedings partly in Latin and partly in English, no Error.

Mr. R. con: This is aided by the late Act of Parliament, which is express that no Judgment shall be reversed, where Proceedings are Part in Latin, and Part in English. The Words of the Act are, "That it shall not be Error.

Per Cur', Judgment must be affirmed. Vide Ca. 130.

Wilmore versus Haughton, Mich.  
7 Geo. II. B. R.

Y. C. J. delivered the Opinion of the Court, that the Damnum in the Declaration must be the Measure of the Damages. The Case of Wilmore versus Haughton was Trespass in Assault and

(130.)  
The Damages laid in the Declaration, and not those Damages.

images found by the Jury, to govern on the Statute 5 Geo. 2. For Proceedings to be in English where the Cause of Action is under 10 l.



and Battery, and 40 *l.* Damages laid in Declaration; the Jury found for the Plaintiff, and gave 1 *s.* Damages. Error was brought upon this Judgment, and assigned for Error, that Damages being under 10 *l.* the Proceedings ought to have been in *English*, for that the Cause of Action was the Damage given in the Verdict. The next is the Case of *Thurston and Harris*, which was an Action of *Assumpsit, ad damnum* 20 *l.* There is Judgment by Default, a Writ of Inquiry executed, and 6 *l.* given in Damages. A Writ of Error is brought, and assigned, that Proceedings ought to have been in *English*. The next is the Case of *West and Nichols*, which was Trespass in Assault, &c. *ad damnum* 100 *l.* there is Verdict for Plaintiff, and 40 *s.* Damages; Error is brought, general Errors are assigned, and insisted, that Damages being under 10 *l.* all the Proceedings ought to have been in *English*. It has been argued for the Plaintiffs, that the Finding of the Jury is the Cause of Action, and that neither Party nor Court can say otherwise. On the other Side, it is said, that Damages in the Declaration is the Cause of Action. *Vide* 5 Geo. 2. *For that in Actions which sound in Damage, the Plaintiff cannot prophecy what Damage the Jury will find. Under these Circumstances the Court is of Opinion, that the Quantum in the Declaration is to be the Measure of the Damages.* This Act of Parliament is introduced with a Recital of 12 Geo. 1. intitled, *An Act to prevent frivolous and vexatious Arrests, and by that Act the Cause of Action is to be taken from the first Process served upon the Defendant.* And in the same Act of Parliament there is another Clause, which relates to the Issuing out of Special Writs; and here the Cause of Action must necessarily be understood of the Demand laid in the Process, or else the Officer may be an Offender *ex post facto*, for what he could not foresee. In pleading the Statute of Limitations, the Averment is *quod causa actionis non accrevit, &c.* and Cause of Action in this Case relates to the Demand in the first Process. *Stat. Glouc. c. 8.* Courts of Westminster shall proceed in no Cause, where the Cause of Action is under 40 *s.* but that must be taken from the Cause of Action laid in the Declaration. 2 Inst. 311, 312. So if Action is in an inferior Court, and the Damnum is under 40 *s.* tho' the Jury should give upwards of 40 *s.* yet the Plaintiff shall have his Judgment, and may release Damages above what is laid in the Declaration. This Case would have had some Consideration, if it had depended singly upon this Act of Parliament; but it is now made clear beyond all Doubt, by an Act of Parliament passed the last Sessions, intitled, *An Act to explain* 5 Geo. 2. *and to extend it to the great Sessions of Wales.* *Vide the Act of Parliament.* By this Act the Debt or

or Damage declared in the Process are Words synonymous to the Cause of Action mentioned in 5 Geo. 2. and therefore the Court is of Opinion, that the Judgments in these Cases in the Common Bench must be affirmed. There is another Case, which is the Case of *May versus Osborne*, that is the Reverse to these; for there the Plaintiff declares in *English*, *ad damnum* 25 l. There is Judgment by Default, a Writ of Inquiry executed, and 9 l. 10 s. Damages given. Error is brought, general Errors are assigned, and objected, that the Declaration being in *English*, the Judgment was erroneous. Both these Cases cannot be aided by 5 Geo. 2. and therefore this Case must stand upon the old Law, and there is no Question but then the Judgment is erroneous; for 36 Ed. 3. c. 15. expressly provides that all Entries shall be in *Latin*. This Judgment therefore must be reversed. Vid. ante Ca. 129.

*Amcourt ver. Elever*, Mich. 7 Geo. II.  
B. R.

IN *Assumpsit*. The Plaintiff declares that the Defendant, in Consideration the Plaintiff had promised to assign him a Lease, he the Defendant, in Consideration thereof, promised to pay, &c. The Defendant pleaded that the Plaintiff had not assign'd, &c. and to this the Plaintiff demurs. The Question is, If the Assignment on Part of the Plaintiff is not a Condition precedent to the Payment of the Money by the Defendant. Vide 1 *Lutw.* 245. *Thorpe versus Thorpe*. 1 *Roll.* 415. 2 *Saund.* 155. *Hunlock versus Blacklowe*. Stands over.

*The King ver. Carter*, Mich. 7 Geo. II.  
B. R.

THE Defendant was found guilty of Manslaughter by the Coroner's Inquest, and being brought up by *Habeas Corpus*, moved to be bailed, having Affidavit that one of the Jury had laid several Wagers that the Coroner's Inquest would find the Defendant guilty. It appeared by the Inquisition, that Carter struck the Deceased without Provocation, which was the Occasion of his Death; and then it goes on, and finds him guilty of Manslaughter.

Cur': This is the Evidence upon which the Inquisition was taken, and by the Circumstances of the Fact the Defendant appears to be guilty of Murder. As to his Objection to the Jury, that may be a proper Defence for him upon his Trial:

But



*But we cannot enter into the Merits upon Affidavits; and therefore denied him Bail.*

Greeting ver. Allcock, Mich. 7 Geo. II.

B. R.

(133.)  
Latitas to the  
Chamber-  
lain of Che-  
ster.

THE Plaintiff sued out a *Latitas*, directed to the Chamberlain of the County Palatine of Chester, which he served upon the Defendant, without any Mandate from the Chamberlain, which was now complained of as irregular, and Motion made to set aside Proceedings. Before 12 Geo. 1. the King's Process did not run into the Counties Palatine, and therefore was always directed to the Chancellor, who made out his Mandate directed to the Sheriff to execute the same. 4 Inst. 212. This Act of Parliament does not take away the Jurisdiction of Counties Palatine; but, in general, that no Arrest shall be made where Debt is under 10 l. In 5 Geo. 2. Which is made in Explanation of the former, there is a particular Clause to save the Jurisdiction of Franchises and Liberties, that in all Franchises, &c. particular Officers shall execute the Process.

Mr. F. con: The Act of Parliament mentions Process only issuing out of superior and inferior Jurisdictions; but a Mandate issuing out of no Court at all, it is no more than the common Case of a Sheriff: Where Process is to be executed in a particular Franchise, the Sheriff makes out the Warrant to the particular Officer; and tho' in these Cases the Mandate is under Seal, that makes no Difference. Since the Making this Act, no Warrant is now made out by the Sheriff, but Copy of the Process is served in the first Instance. The Stat. 5 Geo. 2. makes no Difference, but is rather in Favour of the Plaintiff, for this Act is relative to 12 Geo. 1. and the Words are, "That Affidavit must be made before the Judge or Commissioners of that Court out of which such Process issues." And the Act requires Service of such Process issuing out of inferior Courts, and the Person executing such Process shall take no more than 5 s. for Service of such Copy: But if a Mandate be necessary, more may be taken, for that is casus omissus in the Act of Parliament. Proviso in the Act of Parliament makes no Difference, but only that in particular Franchises and Jurisdictions the Process must be executed by the proper Officer. If this Clause had not been included, an Attorney, or any other Person, might have served the Copy of the Process; but to save the Profits arising to the Lords of these particular Jurisdictions, was the Reason of adding that Clause.

T. C. J. The Nature of the Process to be served runs thro' both Acts of Parliament, and the Service (of such Process) is relative to the Process which originally issues; but a *Mandate is not Part of that Process issuing out of the same Court.*

P. J. The Word *Process* in the first Act extends to the original Process out of this Court, and the Word (*such*) makes it stronger: Besides, there must be a Return of Process. *What Process? That which issues out of this Court.* The Proviso in the second Act of Parliament does not go so far as is contended for. It was never the Meaning of the Legislature to have Proceedings below run in the same Chancel as before the Act of Parliament. *The Proviso is to preserve the Lord's Profit arising from his particular Franchise, that the Process issuing out of this Court should be served by the particular Officer of that Franchise.*

P. J. Copy of Process to be served within the Meaning of both these Acts of Parliament, must be the original Process issuing out of superiour Courts. The Chamberlain's Mandate is not to be looked upon as a Process, for his Office is partly Ministerial. This Act was made to prevent Charge and Expence in the Execution of the Process, that a Copy of the Process may be served without the Interposition of the Sheriff. If a Mandate should be necessary, the Act of Parliament will be of little Benefit; and as the Sheriff's Profit is taken away as to the Service of Writs, so would the Lords of particular Franchises have lost theirs, but for the Saving of the Act of Parliament.

L. J. This Case depends upon the Construction of the first Act of Parliament, and is not aided by 5 Geo. 2. the Clause concerning the Service of Process, is relative (*such Process*) and can be no other than the original Process issuing out of this Court. *Motion over-ruled by the Court.*

## The King *versus* Earbury, Mich. 7 Geo. II. B. R.

THE Defendant was arrested by Virtue of a Warrant signed (134.) Charles Delafay, being charged as Author of a Libel, called The Royal Oak Journal, and by Recognizance bound to appear at the King's Bench Bar the first Day of the next ensuing Term, and there to answer all such Matters as he should be charged with from the Bar. Mr. Earbury came into Court the Term following, and objected to the Legality of the Warrant, and of the Recognizance, but refused to have his Appearance

Recognizance taken by a Justice of Peace to appear in this Court to answer all Matters generally, not specifying the Facts.



appearance recorded; notwithstanding the Clerk recorded his Appearance, being then present in Court. Mr. J. Counsel for the Defendant, insisted, That altho' Mr. Earbury did appear in Court, yet the Court could not record his Appearance against his Consent, Goldf. 118. which was in the Case of a Prisoner; here the Defendant is not so. The Court entered the Presence of the Defendant, but would not enter his Appearance. *Essoin* does not enter Appearance, only an Excuse for not appearing. 4 Fac. 2. *The King against the Archbishop of Canterbury.* The Archbishop was committed by the Priory Council upon a Libel, called a Petition of Remonstrance to the King not to intermeddle with Church-Government. And it was objected to the Commitment, That the Bishop could not be charged with an Information, unless properly and legally in Court. 47 Ed 3. *Tit. Annuity.* 1 Sid. 32. Judgment ought not to be given because no Appearance, and the Bond is only a Promise to the Sheriff to appear, Lutw. 951. unless there be Process, and Party have a Day in Court, he cannot appear; and this Recognizance is no Process to bring the Party into Court. Recognizance, illegal in Form and Substance! The Condition is, if the said Mr. Earbury shall appear in B. R. to answer such Matters as shall be objected to him at the Bar, but nothing then charged upon him. This is too general, for the Recognizance should have mentioned the Facts he was obliged to answer. Lamb. 89. Dalton, Tit. Recognizance; and the Practice is always to express the Cause, Godb. 147. *Acts c. 25. v. 7.* Festus said to Agrippa, concerning Paul, For it seems to me unreasonable to send a Prisoner, and not wishin to signify the Crimes laid to his Charge. Recognizance bad in Substance, for Justices of the Peace have no Power to bind any one to his Appearance into this Court. They have only an inferior Jurisdiction, and their Proceedings cannot be brought into this Court but by *Mandamus*, or other legal Process issuing out of the Court. This is a Court of the greatest Dignity, see 4 Inst. Form of a Recognizance is to appear coram me, but does not say before whom by Name. Un' Justiciar', &c. Objection to Commitment, that it was to a Messenger's House, which is no Prison in Law, and therefore illegal. Recognizance obtained by Duress, therefore void. Cro. Eliz. 646, 745. Magna Charta, c. 29. 25 Ed. 1. c. 1. & 2. No Examination, Dalton, c. 170. No Warrant produced, Vide 1 Salk. 347. Kendal and Roe 5 Mod. 78. same Case. Commitment for high Treason in aiding the Escape of H. committed for Treason, ought to specify the Treason for which H. was committed. 1 Leon. 70, 71. Secretaries of State may commit as Conservators of the Peace at Common Law. 1 Salk. 347. May commit to a Messenger,

for the Court will intend it only in Order to carry him to Gaol.  
1 Salk. 347.

## The King versus Gallard, Mich. 7 Geo. II. B. R.

**INDICTMENT** contra bonos mores, for running in the common Way naked down to the Waist, the Defendant being a Woman. S. moved to quash, because the Fact is not indictable. F. cont: Indictments will lie contra bonos mores, as against Curle for publishing an obscene Book. 1 Sid. 168. Sir Charles Sidney's Case, 1 Keb. 620. Quia immodeste & irreverenter behaved himself in Church. Another Indictment was for printing Rochester's Poems; sed per Cur, The Indictment must be quashed, for nothing appears immodest or unlawful. (135.)  
Indictment contra bonos mores.

## Chapman versus Brown, Mich. 7 Geo. II. B. R.

**ACTION** of Assault and Battery, and Costs for not going on to Trial. The Plaintiff brought a fresh Action, and now Mr. S. moved to stay Proceedings till the Plaintiff had paid the Costs of the first Action, and produced an Affidavit that the Plaintiff was gone beyond Sea, so that if the Verdict should be for the Defendant, no Person to come against for Costs. The Court said this Motion was against the general Rule; but the Plaintiff being beyond Sea, did vary the Case, and therefore ordered to search Precedents. Mr. S. then turned the Motion, that the Attorney might shew by what Authority he prosecuted this Action, contrary to the express Command of the Plaintiff; but this the Court absolutely refused. At another Day Mr. S. stirred this again, and cited the Case of a Pauper; but the Court said that did not come up to the present Case, and remembered the Case of Knock versus Wilkins, which was an Action of Assault and Battery, and like Motion was denied. The Attorney for the Plaintiff afterwards entered into a Rule by Consent to pay Costs, if the Plaintiff should be nonsuited, or a Verdict against him. Note; In the Case of Jones versus Eubank, Mich. 3 Geo. II. the like Motion was made, and granted per Cur.

Murray



Murray *versus* Anderson, Mich.  
7 Geo. II. B. R.

(137.)  
Justification  
in Trespass.

**T**RESPASS for entering into the Plaintiff's House and taking two Shirts; and the Defendant justifies, for that the Plaintiff was fined the Sum of 3 s. and that he entered and took the Goods in order to satisfy this Fine, and thereupon the Plaintiff demurred. And it was now objected, that the Plea was uncertain; for it does not appear how this Fine was imposed, only said in general, that the Plaintiff was fined, without saying where, by whom, by what Authority, or for what Offence: All that is said is, that this Fine was allowed in the Exchequer Chamber upon the Sheriff's Account, to be due to the chief Bailiff of the Manor of Stepney; but it is not said that it was due to him as chief Bailiff.

*Cur:* It is said to be allowed him upon the Sheriff's Account and upon the Roll in the Exchequer, the Entry is always general. It appears by the Plea, that the Defendant was fined, and that the Goods were levied accordingly.

Bainton *versus* King, Hil. 7 Geo II.  
B. R.

Lord Hardwicke, Chief Justice.

Page, }  
Probyn, } Justices.  
Lee, }

(138.)  
Debt upon  
Award.

**D**EBT upon Award. The Defendant pleads *no Award*. The Plaintiff replies, and sets out an Award, that the Defendant should have all his Goods taken in Execution, except those which were already sold; that he should thereupon pay so much Money to the Plaintiff, and all Parties should execute mutual Releases. To this the Defendant demurs, and objected, that this Award was made on one Side only, for that the Defendant could have no Benefit of the Award, and cited 3 Mod. Rep. 272. *Thirby versus Helbott*. It is uncertain what Goods the Defendant was to have again, and not in his Power to know what were sold, and what were unsold at the Time of the Award.

S. Counsel

S. Counsel *con'*: Here are mutual Releases to be executed, which makes it a good Award; for if I am to pay Money, and another is to release, this is a mutual Award. The Defendant is to have all and singular the Goods which remain unfold; and this is a sufficient Ascertaining of the Goods, by Reference to the Goods taken in Execution. It is like the Case of Taxing Costs, or Awarding an Account, for in both Cases what is due may be reduced to a Certainty.

H. C. J. Awards have of late been more favoured than formerly; and therefore, if by any favourable Construction this can be reduced to a Certainty, the Court will intend it a good and sufficient Award. Here is something awarded *extra* the mutual Releases, and if either Party cannot have the Benefit of it, it is a void Award. Here are goods to be restored to the Defendant, except such as are sold: How does the Defendant know what Goods remain unfold? what these Goods are that were sold, and whether sold bona fide may be disputed; and so many other Objections may arise, that this Award is by no Means conclusive between the Parties. *Adjournatur*, to be spoke to again.

A Man shall not reverse a Judgment for Error, unless he shews that the Error was to his Prejudice. 5 Rep. 39 b. in Tey's Case.

## The Bank of England *versus* Morice, Executrix of Humphrey Morice deceased, Hil. 7 Geo. II. B. R.

IN *Assumpsit* against the Defendant, as Executrix of H. M. (139.) deceased, the Defendant pleaded several Specialties standing out against her Testator, and set out Bonds specially, and disclosed particularly what was in Reality due thereupon, and that she had not Assets *ultra*. The Plaintiffs replied Assets *ultra*; and upon this they were at Issue.

Upon the Trial a Question arose whether the Penalty in the Bonds, or so much only as was disclosed by the Defendant to be really and bona fide due thereon, should be allowed to cover Assets.

There was a Verdict for the Plaintiffs, &c. for 28000 l. and upwards given in Damages; but R. C. J. saved this Point to the Defendant, and afterwards, upon Argument, the Court being of Opinion that the Penalty was the Debt in Law, a Trial was granted *de novo*.



*E. Serjeant* came this Term into Court, and prayed to amend the Replication, and that instead of replying Assets *ultra*, the Plaintiffs might reply what was really due upon the Conditions; That the Obligees were willing to accept thereof, and that the Defendant kept the Bonds on Foot *per fraudem*. Upon shewing Cause it was objected, That Courts of Law had never gone so far; that this was not to amend the Replication, but was making it an intire new Issue. *Salk.* 50.

If this Practice prevails, there will be no Occasion to discontinue or pray a Repleader.

In all Cases where Applications of this Nature have been made, it has been under this Circumstance, "If it can be no Prejudice to the Defendant." Here it may be the greatest Prejudice; for the Plaintiffs have not stirred in this Action for now almost a Year and a Half, and the Defendant has paid away Assets recovered upon Suits commenced since the Commencement of this Action; and therefore it will make a *Deceit*, if the Plaintiffs recover in this Action, and there appears to be a Defect of Assets.

*H. C. J.* There is no Question, but after a Trial *de novo* is granted, an Amendment may be made which does not alter the Nature of the Issue: But here the Question is, Whether an Amendment can be made which intirely alters the Issue?

*E. Serjeant e con'*: This Amendment makes no Alteration in the Nature of their Plea, nor in the Issue: For the Question in Substance will be, Whether she has Assets *ultra* what was really and *bona fide* due upon the Specialties?

There are several Cases where Amendments of this Nature are made after Issue joined; but the Case of *Thompson* against *Hunt*, 3 *Lev.* 368. is a Case in Point. 1 *Leon.* 24. *Cro. Jac.* 306. 1 *Sid.* 412. So is 3 *Lev.* 347. and 3 *Lev.* 440. the Case of *Stephens* versus *Cooper*, 3 *Lev.* 20. *Dobson* versus *Douglas*.

There was a Case lately adjudged in this Court, which seems to go further than the Case in Question, and that is the Case of the *Executors of the Duke of Marlborough* against *Wigmore*, Hil. 4 Geo. II. In *Assumpsit* the Plaintiffs declared upon a Promise made to the Duke of Marlborough in his Life-time; the Defendant pleaded *non Assumpsit infra sex Annos*, and upon this the Parties were at Issue, and the Cause was carried down to Trial. The Plaintiffs afterwards prayed to amend, by laying the Promise to be made to the Executors themselves, and the Court upon Consideration made a Rule accordingly.

*H. C. J.* conceived this Amendment is not consistent with the Rules of Law, nor with the Rules of this Court. This Amendment is no Part of the Rule itself, and there is no

Question

Question, when the Court made the Rule, it was in the Power of the Court to put what Terms upon it they thought proper. I am of Opinion this Motion cannot be granted, for it is not so properly a Motion to amend, as to withdraw the Replication intirely, and make a new Issue; this is indeed a common Practice in Equity, but I never knew it to prevail in a Court of Law. The Case of *Thompson and Hunt* does not go so far as the present Case: In that Case the Plaintiff alledged in his Replication, that there was only so much really due, but had omitted that the Obligees were willing to accept the same, and the Adding these Words did not alter the Plea: But that Case seemed to go farther than any Case he said he ever heard of, and seemed contrary to Law to grant a Repleader after Judgment in Demurrer, and questioned if that Case was not upon Consent. *Vide 3 Rep. 52 b. in Ridgeway's Case, 1 Anders. 168. 1 Leon. 79. c. 102. Zouch versus Bamfield. Plow. 138. Browning versus Beston. There was a Repleader after Demurrer.*

The Duke of *Marlborough's* Case does not come up to the present Question: The Amendment in that Case did not vary the Fact, nor alter the Record, but the Issue continued as it was before.

The Circumstances of this Case are very much to be considered; this is in Case of an Executor, *where Priority of Suit prevails*; the Plaintiffs having lain by a Year and upwards, it may reasonably be supposed, that the Defendant imagined the Cause to be intirely dropt, and that she has paid away the Assets; it would therefore be a little hard, that the Defendant should be prejudiced by the *Laches* of the Plaintiffs, especially in this Case, where the Rules of Law seem so strongly to favour her.

P. P. and L. Justices being of the same Opinion, the Motion was denied. Denied.

## Arthur *versus* Vanderplank, Hil. 7 Geo. II. B. R.

**A**CTION of Covenant for Rent against the Defendant, Executor of J. S. Lessee for Years. The Defendant pleads, that the Lessee in his Life-time made an Assignment of his Term, and that the Plaintiff, the Lessor, had received Rent, and accepted the Assignee for his Tenant; and to this the Plaintiff demurs.

(140.)  
Covenant for Rent against the Executor of a Lessee, where the Lessee in his Life-time had assigned his Term,

and the Lessor had accepted the Assignee for his Tenant.  
B. Serjeant,



*B.* Serjeant argued against the Plea, that it was bad. It is true, in an Action of Debt for Rent, this is a good Plea, 3 Rep. 22. *a & b. Walker's Case*; but in Action of Covenant it is otherwise. *Cro. Car.* 188. 1 *Jones* 183. *Stiles* 265.

Mr. P. of Counsel with the Defendant, gave up the Point without Argument, and so Judgment was given for the Plaintiff.

Note; *Covenant lies not against Executors by Reason of the general Covenant in Law, by Virtue of the Words Demise and grant; but it is otherwise upon an exprefs Covenant.* *Dyer* 257. 2 *Brownl.* 214.

*Covenant lies against the Lessee after Assignment, although the Lessor had Notice and accepted Rent of the Assignee.* 3 *Lev.* 233. *Edwards versus Morgan*; but not Debt.

## Stephens ver. Stephens, Hil. 7 Geo. II. B. R.

(N. B. This Case was sent out of Chancery, for the Opinion of the Judges of the Court of King's Bench.)

(141.)  
Of executo-  
ry Devises.

SIR *William Stephens* being seized in Fee of several Freehold Messuages, Lands and Tenements, devised them in the Manner following; "I give and devise to my Grandson *William Stephens*, after the Decease of my Wife *Susanna*, "all my Lands settled on my said Wife for Life; and also all "my Lands, Tenements and Hereditaments in *Deptford* in "the County of *Kent*, settled upon me by Deed by my "Wife, to hold to me and my Heirs for ever. "Item, I give and devise to my said Grandson *William Stephens* all my Lands and Tenements in the Parish of "St. Mary Bermondsey in the County of *Surry*; situate and "being at *Rotherith Wall, East Lane, St. Mary Magdalene Church-yard, &c.* to hold my said Messuages, Lands, Tenements, &c. to my said Grandson *William Stephens*, his "Heirs and Assigns for ever. But, in case my said Grandson *William* happen to die before he attains his Age of twenty-one Years, then I give and bequeath to my Grandson *Thomas Stephens* all my Messuages, Lands and Tenements before mentioned, as well as those in the Parishes of *St. Mary Magdalene Bermondsey*, and *St. Olive in Southwark*, as those in the Counties of *Essex* and *Kent*, to hold the same to my said Grandson *Thomas*, his Heirs and Assigns for ever.

"But

“ But if my said Grandson *Thomas* should happen to die  
 “ before he attains the Age of twenty-one Years, then I give  
 “ and bequeath all my said Lands, Tenements, &c. before-  
 “ mentioned, to such other Son of my Daughter *Mary Ste-*  
 “ *phens* by my Son-in-Law *Thomas Stephens*, as shall happen  
 “ to attain his Age of twenty-one Years, his Heirs and Assigns  
 “ for ever; the elder of such Son to take Place before the  
 “ younger, one after another, in Seniority of Birth, &c. and  
 “ of the several and respective Heirs Male of such respective  
 “ Bodies of all and every such Son and Sons; the elder of such  
 “ Sons, and the Heirs Male of his Body lawfully issuing, to  
 “ be always preferred, and to take Place before the younger  
 “ of such Sons and the Heirs Male of his and their Body and  
 “ Bodies issuing: And for Default of such Issue Male, then I  
 “ give and devise my aforesaid Freehold Estate, &c. to all  
 “ and every the Daughter and Daughters of my said Son  
 “ *Thomas Stephens*, on the Body of my said Daughter *Mary*  
 “ to be begotten, and to the Heirs of the Body and Bodies of  
 “ all and every the said Daughter and Daughters, as Tenants  
 “ in Common, and not as Joint Tenants: And for Want  
 “ of such Issue, then I give and bequeath my aforesaid Free-  
 “ hold Estates, &c. to my Brother *Richard Stephens*, his  
 “ Heirs and Assigns for ever.

“ *Item*, All the rest and Residue of my Estate, both real  
 “ and personal, Goods, Chattels, &c. whatsoever and where-  
 “ soever, not hereby before bequeathed, I give and bequeath  
 “ the same to my said Son *Thomas Stephens*, his Executors,  
 “ Administrators and Assigns for ever;” and made his said  
 Son, *Thomas Stephens* his sole Executor.

15th March following the Testator died, leaving *Mary* the  
 Wife of the said *Thomas Stephens*, his Daughter and Heir,  
 and his two Grandsons *William* and *Thomas Stephens*, living  
 at the Time of his Death, but no Grandaughter.

18th May 1713. *Susanna*, Daughter of the said *Thomas*  
 and *Mary Stephens*, was born, and is still living.

24th October 1714. *Thomas Stephens* the Grandson died  
*sans Issue*, and under the Age of twenty-one Years.

14th September 1718. *William Stephens* the Grandson died  
 without Issue, and under the Age of twenty-one Years.

14th March 1719. *Mary Stephens*, another Daughter of  
*Thomas Stephens* and *Mary* his Wife, was born, and died  
*sans Issue* and under Age, 26th October 1722.

13th November 1721. *Sarah*, another Daughter of *Thomas*  
 and *Mary Stephens*, was born, and is yet living.

15th February 1722. *Mary Stephens*, another Daughter  
 of *Thomas* and *Mary Stephens*, was born, and died without  
 Issue and under Age, 26th April 1723.



12th January 1727. *Thomas Stephens*, one of the Parties in this Suit, Son of the said *Thomas* and *Mary Stephens*, was born, and is still living.

*Richard Stephens*, to whom the Testator devised the Remainder in Fee, is still living.

*Thomas Stephens* the elder claims Title to the said Premises, as residuary Devisee.

*Mary*, his Wife, claims Title as sole Daughter and Heir to Sir *William* the Testator; and the other Parties likewise claim Title under the said Testator's Will.

*Peere-Williams*, Counsel for the Infant *Thomas Stephens*.

The present Question as to *Thomas* the Infant is, Whether he will not be intitled if he attains the Age of twenty-one Years? The Testator devises his Lands, &c. to his two Grandsons *William* and *Thomas*, and in case they happen to die before they attain the Age of twenty-one Years, then to such other Son and Sons of his Daughter *Mary*, &c. as shall attain the Age of twenty-one Years. The Intention of the Parties in all Cases, especially in that of Wills, is to be regarded, if not inconsistent with the Rules of Law. *Hob. 277*. Here the Testator's Intention appears evidently, that his Grandsons should be first successively intitled to his Estate; and that his Grandaughters should not take but upon Failure of Issue Male. The first Devise to his two Grandsons *William* and *Thomas*, is a Devise absolutely to them in Fee; but the subsequent Words restrain and reduce it to a Fee-simple determinable, viz. if they attain the Age of twenty-one Years; but if they should die before that Time, then the Testator devises it to such other Son as *Mary* should have, &c. when he shall attain his Age of twenty-one Years. These Words make a good *executory Devise* to *Thomas the Infant*, to take Effect in Possession, as soon as he comes of Age.

It cannot be thought that the Testator intended to give a less Estate to the next Son that should afterwards be born, than he gave to his two Grandsons *William* and *Thomas* then in Being.

Limitations by Way of executory Devise operate in the same Manner with springing Uses in Equity; and the Statute of Wills impowers the Testator to devise his Lands according to his Will and Pleasure: But this Power has always been construed so as to avoid Perpetuities, that both executory Devises and springing Uses must arise within a Time limited. In the Cases of Executory Devises, a Fee may be limited upon a Fee, and the Testator may limit it to as many Sons, one after another successively, as *Mary* and *Thomas* shall have of their Bodies; and all this makes no Perpetuity, because confined to a Time limited, and to arise within the Compass of

one Life. One seized in Fee may not only devise his Estate upon a Contingency, but upon Failure of that Contingency may devise it over upon another Contingency likewise; as in the Case of a Term for Years, a Man may devise it to one for Life, Remainder to another for Life, and so on; for all being to arise within the Compass of a Life, there can be no Danger of a Perpetuity. In the present Case, the longest this Contingency can remain in Suspence is twenty-one Years. It is possible *Thomas* the Infant may die within Age, and after that another Son may be born; afterwards *Mary* may die; and so the Estate continue in Contingency till the second Son arise to twenty-one; but this is only during the Infancy of one who is to take, and is a reasonable Time for an Executory Devise to wait.

Suppose the Devise had been to the next Son which *Mary* should have, that without Doubt had been a good Executory Devise; for Executory Devises are not confined to Lives in Being; and therefore if a Term be devised to one for Life, Remainder to the first unborn Son of such Devisee, this is a good Devise. 1 *Roll. Abr.* 612. 1 *Sid.* 451. Admitted nothing vested in *Thomas* before he attained the Age of twenty-one, but this makes no Perpetuity, because it must arise within twenty-one Years, or not at all. A Perpetuity is a Limitation to Persons not *in esse*, to arise upon a future Contingency, beyond the Time circumscribed by Law, and not to be dock'd and defeated by any Act to be suffered or done by the Tenant in Possession. But the Law allows of Limitations to arise within the Compass of a Life, or Lives in Being, or within the Term of twenty or thirty Years; and therefore a Limitation to *A.* when he shall attain the Age of twenty-one Years, is good. So if a Man enfeoffs an Infant upon Condition that he shall not alien, this is good to restrain Alienations during his Minority. 1 *Inst.* 224. a. And if in such Case the Infant suffers a Recovery, he may avoid it afterwards by Virtue of the Condition: So if an Infant levies a Fine, it shall bind him, if not reversed during his Infancy; but where he is restrained by Condition, he shall avoid the Fine, after he comes of Age; and yet it cannot be pretended that the Condition in that Case tends to create a Perpetuity. This Executory Devise is to arise within the proper Time prescribed by Law. 2 *Vern.* 151. *Martin versus Long.* 2 *Vern.* 86, 87. *Paulet versus Dogget.* 3 *Leon.* 65. *Hind and Lyon,* 1 *Salk.* 229. 1 *Vern.* 304. *Massenbury versus Ash.* 2 *Chan. Rep.* 202. *in le Case.* This last is a Case in Point, and answers all Objections that can be made in the present Case; and there is no Difference, but that was in the Case of a Deed, and this here is in the Case of a Devise, which makes it stronger



stronger for our Purpose. The Case of *Blue* versus *Marshall*, August 1732. goes further than the Case of *Massingbury* ver. *Ash*. *J. B.* devised his personal Estate, consisting of Leases for Years, and some Money, to his Daughter *Anne*, and after to such Children as should be born of her Body, and she should leave at the Time of her Death, when they attained the Age of twenty-one, and upon Failure of such Issue, Devises over. *King*, Chancellor, decreed this a good Devise to the Children, and that the Intention of the Testator in the Case of Wills was always to be regarded; and so long as there was such a Case as *Massingbury* versus *Ash* to favour the Devise, he could not decree against it.

This Case is stronger than the Case in Question; for there the Children could not take till after the Death of the Mother; here *Thomas* is to take as soon as he attains his Age of twenty-one, notwithstanding *Mary* his Mother should then be living. There is no Pretence to say that this Limitation shall go by Way of Remainder; for a Fee cannot be limited upon a Fee by Way of Remainder: Should this be construed to operate by Way of Remainder, it is certainly void; for a Remainder must vest during the particular Estate or eo instanti that it determines. 1 Rep. *Archer's Case*. It may be a Question, whether *Thomas*, when he comes of Age, will take a Fee, or an Estate-Tail? The first Words are, "To him and his Heirs;" but then follows the Words, "And for Want of such Issue," which may restrain the Limitation to an Estate-Tail. But, be it Fee, or be it Tail, it is a good Devise to *Thomas*, and will vest in him, when he attains the Age of twenty-one Years.

*W. Serjeant*, Counsel for the Daughters *Susanna* and *Sarah*: This Devise to *Thomas* the younger is void; for as an Executory Devise it cannot be good, because not to arise within the Time prescribed by Law; and as a Remainder it cannot be, because the two first Devisees, *William* and *Thomas*, dying before they came of Age, and before the Birth of *Thomas* the younger, the Estate vested in *Susanna*, who was then living and took the Whole by Purchase, which could not afterwards be divested upon the Birth of *Thomas* the younger. It is an established Rule in Law, That where a Devise is limited by Way of Remainder, and in Effect may operate as a Remainder, it cannot take Effect as an Executory Devise. 2 Saund. 388. Carth. 310. Comb. 252.

The Construction of Wills is to be taken favourably according to the Intention of the Testator; and the several contingent Remainders are to be considered as having Relation one to the other, each to vest as they first come in esse, before the

*Stat. H. 8.* If one had devised his Land by Virtue of a Custom, the Common Law accepted his Intent, without requiring particular Words of Limitation; as in Cases of Conveyances at Common Law: And as it was so in Devises before the *Statute*, a fortiori it ought to be so in Devises since the Statute. 1 *Salk.* 237. 2 *Mod.* 209. The Limitations in this Case to his two Grandsons, *William* and *Thomas*, make an Estate-Tail; for the Devise to them is to be coupled with the subsequent Words, "*And for Default of such Issue*;" so that, notwithstanding by the first general Words (*to them and their Heirs for ever*) they took a Fee absolutely, yet the subsequent Words (*and for Default of such Issue*) so qualify and explain them, that they create only an Estate-Tail. If the Devise had been to *William* and his Heirs for ever, and after to *Thomas* and his Heirs for ever, and if he dies *sans* Heirs; then to such other Son of the Body of *Mary*, &c. it had been clear in that Case what Heirs the Testator meant, viz. the Heirs of their Bodies, and so had been an Estate-Tail only. *Cro. Jac.* 416. *Bridg.* 84. *Cro. Jac.* 448. 3 *Lev.* 70, 71. 1 *Salk.* 233, 234. 1 *Lutw.* 810, 813. These Cases shew, that dropping the Words (*when they attain the Age of twenty-one Years*) *William* and *Thomas* would have taken Estates-Tail only. *Hob.* 65. *Cro. Car.* 183. *Spalding* and *Spalding.* 9 *Rep.* 128. for the Whole of the Will is to be considered together, and construed according to the Intent of the Testator; and these subsequent Words, viz. (*if they should attain the Age of twenty-one,*) make no Difference; for it cannot be presumed, that if either of them died before that Age, that their Estate should cease at all Events, but if they died before that Age without Heirs of their Bodies, as in *Cro. Car.* the Case of *Spalding* versus *Spalding.* *Cro. Eliz.* 525. *Moore* 422. 2 *Lev.* 162. *Tilly* versus *Collier.* These Words to be rejected rather than the Devise to be construed to be void. *Hob.* 65. 6 *Mod.* 112. and in *Cro. Eliz.* the Case of *Soullé* and *Gerrard.* If therefore the Devise in the present Case to *William* and *Thomas* makes an Estate-Tail, then upon the Death of *William* the Estate vested in *Susan* by Purchase, and cannot after be divested, tho' *Thomas* should live to attain the Age of twenty-one Years. As to the Claim of *Richard*, the Remainder-Man, of one intire Third by the Death of *Mary* the elder, and another Third of the other two Parts by the Death of *Mary* the younger; if he has any Claim, it must be of the whole Estate; for so long as there is one of the Daughters living, or any Issue Male of their Bodies, he cannot claim a particular Part only. For it is to be observed, that upon every Limitation all his Lands are devised over, not in Part and by Fractions, but one intire Devise of his whole Estate to every



the Daughter and Daughters, &c. and to the Heirs of the Body and Bodies of all and every such Daughter and Daughters; and for Want of such Issue, *i. e.* by any one of them, that then all his Lands should go and remain to his Brother *Richard*: And in this Case the Daughters *Susan* and *Sarah* cannot be Tenants in common, because upon the Death of *William* the whole vested in *Susan*; and therefore *Sarah* cannot take as Tenant in common with her, but shall have one intire Remainder of the Whole; so that while there is any one Daughter, the whole cannot go over to *Richard*; for all the Daughters may take successively in Course of Remainder, as in the Case of *Tilly* versus *Collier*, 2 *Lev.* 162. 1 *Ventr.* 224. *Dyer* 303. *b.* A Devise in such Case to the Daughters make cross Remainders, and tho' not by exprefs Words, yet it must be by a necessary Construction in Law. An Executory Devise when executed is to be considered as an original Devise; and therefore if the Devise to *Thomas* be good, and is to vest at his Age of twenty-one, the Contingency is then at an End, and the Daughters will have Remainders expectant upon his Estate-Tail.

*E. Serjeant*, for *Richard* the Remainder-Man in Fee: The Devise to *William* and *Thomas* is a good Devise to them upon this Contingency when they attain the Age of twenty-one; but the Devise over to the other Son, there being no other Son at that Time in Being, is meerly void, not being limited to arise within the Time appointed by Law for Executory Devises to vest in: Upon the Death therefore of *William*, the whole Estate vested in *Susan*, *sub modo*, *i. e.* until the Birth of another Daughter, and then it was to open and let in another Daughter, and so on successively as they came in Being, and then all the Daughters became Tenants in common *in Tail general, with Remainder in Fee* to *Richard*. *Mary*, one of the Daughters, dies, and upon her Death *Richard* becomes intitled to one Third of the Estate; afterwards *Mary* the younger is born, and then the Estate opened again to let her in for a Third of the two surviving Sisters Estate, and she dying her Share likewise is to come to *Richard* the Remainder-Man; and this he collected from the Words of the Devise. My Brother *W.* insists, That the Estate once vested in *Susan* would not open to let in Daughters born afterwards, but that they must take by Way of cross Remainders; but this is a forced Construction, for the Words of the Devise are, "That all the Daughters should take as Tenants in common," and no Construction shall prevail contrary to the exprefs Words of the Will to vest the whole Estate in *Susan*, with cross Remainders to the Daughters born afterwards; that Estates once vested may open again, is a Point well settled in Law. 11 *Rep.*

80. *Lewis Bowles's Case*, 1 Inst. 28. a. And when this Case was heard before *Macclesfield*, Chancellor, 25 January 1722. upon a Bill for Account of the Profits of the Estate, his Lordship decreed that the Rents and Profits of the Estate should be divided equally amongst the Daughters, which shews clearly, that upon Birth of Sisters they should all take equally as Tenants in Common.

H. C. J. This is the common Case of every Marriage Settlement, where Remainders are to Daughters in Common, they are to take equally as they arise *in esse*, and become Tenants in Common, or Jointenants, with the Sisters before in Being.

E. Serjeant: They must take as Tenants in Common, for so was the Intention of the Testator; and not that they should take cross Remainders; the express Words of the Will are, "That they shall take as Tenants in Common, and not as Jointenants;" and nothing can more fully express the Testator's Intentions, that they shall not inherit one after another. The Heir at Law can in this Case have no Pretensions, for he is intirely cut out and disinherited by the Will; and therefore no Construction can be made in his Favour, as Heir at Law.

The Case of *Gilbert versus Witty*, Cro. Jac. 655. is stronger than the Case in Question; and yet there it was adjudged that the Brothers should not take Remainders after one another, for tho' perhaps a cross Remainder may be by Implication, where there are two Devisees only, yet there cannot be without express Limitation, where the Devise is to three or more several Persons. There are several more Cases to this Purpose, and the Case of *Megnal versus Holmes* is like the present Question. 2 Roll. Rep. 281. 1 Vent. 224. 2 Keb. 700, 756. And so concluded, that if the Devise to *Thomas* the Younger was void as an Executory Devise, then by the Death of *W.* the whole Estate vested in *Susan*, and the other Daughters, as they came *in esse*, as Tenants in Common, and as they or any of them die, *Richard* the Remainder Man becomes intitled to her Share.

Mr. S. Counsel for Sir *Thomas Stephens* the Residuary Legatee.

Since the Determination in *Pell* and *Brown's Case*, there is no Question but there may be a Limitation over upon a Fee Conditional, and therefore the Limitation over to his Grandson *Thomas* was good; but in this Case both the Contingencies have happened by the Death of *W.* and *J.* before they attained the Age of twenty-one. The next Question therefore is, whether the Limitation over to such other Son as *Mary* should have, there being no other Son at that Time  
in



in Being, when he shall attain his Age of twenty-one Years, is a good Devise; and this some of the Gentlemen who spoke before have attempted to make good by way of Executory Devise.

The Rule which governs Executory Devises has been often debated in the Courts of Law; and it is agreed, that Limitations for a Life or Lives in Being, are good Executory Devises. But this Rule has never been carried further, but Executory Devises, as often as they came under the Consideration of the Law, have been discountenanced; and the Reason is, that every Executory Devise, so far as it goes, is a Perpetuity; and this was the Foundation which governs the Resolution in the Case of *Scatterwood* versus *Edge*. *Salk.* 229. 1 *Sid.* 37, 47. 2 *Saund.* 380. *Carter* 53. *Show. P. Cases* 137. The Case of *Massingbery* versus *Ash* does indeed go further, but that Case was determined in 1684. and was not in the least regarded in any of the subsequent Resolutions; and if the Reasons in that Case come to be considered, it is not so strong; for it appears that the Judges grounded their Opinion in that Case upon a Supposition, that all the Contingencies were limited and confined to fall within the Compass of Twenty-one Years; and that was in the Case of a Term in Trust only, and not any Limitations over. 2 *Chan. Rep.* 282. The Devise in the present Case is not a Contingency confined to Twenty-one Years, or for Lives in Being, but is both for a Life in Being, and Twenty-one Years. In the Case of *Gore* versus *Gore* this Point bore a strong Contest, and yet the farthest that that Case could run, was only for one Life and nine Months. But should this Devise be held good as to Time, yet it is not so in Substance; for tho' a Fee in Contingency may be limited over in Case of an Executory Devise, yet a Contingency cannot be limited upon a Contingency. *Ventr.* 236. And this Point never was carried farther than *Pell* and *Brown's* Case.

The next Persons who claim under the Devise are the Daughters *Susan* and *Sarah*, and as to them the Devise is no more than this: Sir *William Stephens* devised to his two Grandsons in Fee, upon the Contingency of their attaining the Age of Twenty-one; after that to the first and every other Son of *Mary* and the Heirs Male of their Bodies, and upon Failure of such Issue, then to the Daughters. It is not insisted upon that the Daughters in this Case are to take by way of Executory Devise, the Limitation to them being upon Failure of Issue Male, and therefore if they can take at all, it must be by way of Remainder; but that is not possible, because a Remainder, as a Remainder, cannot be limited upon a Fee *Plowd.* 29. 1 *Inst.* 18. a. *Finch L.* 112. *Plowd.*

*Plowd.* 235. a. 239. *Cro. Jac.* 590. *Pell's and Brown's Case.* *Palm.* 138. *Dyer* 33. Serjeant *Wright* was I suppose aware of this Objection, and therefore contends that the two Grandsons *W.* and *T.* took an Estate-tail only; but there is no Colour for such a Construction. The Devise is "To them and their Heirs for ever;" but in Case they die before they attain the Age of Twenty-one Years, &c.

If these Words do not create a Fee-simple Conditional, it is impossible any Words can. Had the Limitation been to him and his Heirs for ever, that would have been a Fee-simple absolute, and the subsequent Words, *viz.* "And if he die before Twenty-one," make it Conditional. When the Testator intends to create an Estate-tail, he does it by Words proper to create such an Estate, *viz.* "And for Default of such Issue Male," which limited the preceding general Words, and shew what Heirs he meant, *viz.* Heirs of his Body. We are to take the Devise itself from the Words of the Will, which are upon his dying before Twenty-one, and not upon his dying without Heirs Male under Twenty-one. This plainly shews the Testator's Intentions, that the Estate of his two Grandsons *W.* and *T.* was to cease at all Events upon their Decease before Twenty-one. This therefore reduces the Devise to the Daughters to the first Question, *viz.* That, if they have any Claim, it is by way of Remainder, and by Remainder they cannot take, because limited upon a Fee. There is the same Objection to the Claim of *Richard* the Remainder-Man in Fee, and the Devise to him is void for the same Reasons. The next Person who stands upon the Will is Sir *Thomas Stephens* the Residuary Devisee, and all the Testator's Estate must go to him, or to the Heir at Law; it is pretty clear the Heir at Law can have no Claim, for she is mentioned several Times in the Will, and the whole Estate is devised away from her. The only Question therefore that remains is, whether there are sufficient Words in the Devise to carry the Estate to the Residuary Devisee. *Vide Allen* 28. *Salk.* 239. 2 *Ventr.* 285. 3 *Mod.* 229. 1 *Lev.* 212. 1 *Saund.* 180. 1 *Leon.* 251. The Testator having devised all his Estate whatsoever and wheresoever, before undevised to the Residuary Devisee, by these Words, which are as general as Words can be, he becomes intitled to the Lands in Question; for all the preceding Limitations being void, the Estate in Question remained undevised.

*F.* Counsel for the Heir at Law. He agreed with *S.* that all the Limitations in this Will were void, for they must take Effect either as Remainders, or Executory Devises. As to the first, they could not vest, because limited after a Fee. 1 *Rep.* 81. *Popham* 34. And so it was held in *Pell's* and



*Brown's Case.* As to the second, this Devise goes further than any Case, except that of *Massingbery* versus *Asb*, which cannot have its full Weight in this Case, because there the Determination of the Judges went upon one single Point only; and in all Cases ever since the first Introduction of Executory Devises, the Judges have discouraged the Extent of them, because tending to establish Perpetuities. *Parl. Cases*, the Duke of *Norfolk's Case*. The Question therefore is reduced to this, Whether the Residuary Legatee, or the Heir at Law, is intitled? The Testator by the Devise to his two Grandsons *W.* and *T.* disposed of his whole Estate, and had nothing left but a bare Possibility. It cannot be intended that the Testator imagined that the Limitations over to the Sons and Daughters of *Mary* were void, or that he intended that the Residuary Devisee should take any of the Lands mentioned in the Will, for the Devise to him is by express Words, of all his Estate not before devised. The Case of *Wright and Wall*, *Michaelmas 1725. in Com. Banc.* comes up pretty near to the present Question: That was a Devise to *Carter* and his Heirs, and the Testator afterwards by the same Will devises all his Estate before undevised over to another Person; *Carter* died in the Life-time of the Testator, adjudged that the Estates mentioned in the Devise should go to the Heir of the Testator, and not to the Residuary Devisee; and so concluded, that since *Thomas* the Infant could not take by way of Executory Devise, nor the Daughters, nor *Richard*, by way of Remainder, the Heir at Law has a good Title. *Adjournatur* for a second Argument.

### The King against Kinaston, Hil. 7 Geo. II. B. R.

(142.) Information was moved for, and a Rule to shew Cause: On a Rule to shew Cause against an Information, no supplemental Affidavits introducedive of new Matter to be read but in Confirmation only.

At the Day fresh Affidavits were produced, Part in Confirmation, and Part introductory of new Matter; and the Question was, Whether the Affidavits could be read according to the Course of the Court, it being objected, that no supplemental Affidavits could be made but in Confirmation only.

*Cur.* Where Affidavits are produced, Part in Confirmation, and Part introductory of new Matter, it is not a general Rule that they shall be absolutely rejected; but the Court will be pretty nice in distinguishing what is new Matter, and what is in Confirmation of the old.

In Affidavits upon which the Rule was made, the Complaint was, that *A.* and *B.* and several other persons, &c. but no Person particularly charged; these Affidavits were not produced, in order to fix the Charge upon particular Persons.

The Affidavits now offered are intirely introductive of new Matter; for the Charge in the first Affidavits being general, a general Answer would have been sufficient; but this is reducing it to a particular Charge, and therefore makes a particular Answer necessary.

### The King against the Commissioners of Sewers for the County of Lincoln. Hil. 7 Geo. II. B. R.

**P**resentment, that the House of *J. S.* standing upon the River *B.* in the County of *Lincoln*, was ruinous, and that the Water had sap'd the Foundation, by which the Lands adjoining were in Danger of being overflowed, and was become a Nuisance to the Inhabitants thereabouts. The Defendant was convicted, and the Fine estreated into the Exchequer. Defendant mov'd for a *Certiorari* to remove all Proceedings. (143.)

Mr. *A.* objected, that the Fine being estreated, it was now too late.

*Cur.*: There does not appear to be any general Inconvenience in this Case, neither in Prejudice of Navigation, or from the Danger of an Inundation over the County, which are the principal Reasons to induce this Court not to refuse a *Certiorari*; this is only the Case of a common Nuisance, and therefore proper to remove it by *Certiorari*; it being estreated makes no Difference.

### Fathers versus Calcot, Hil. 7 Geo. II. B. R.

**I**ndebitatus Assumpsit in Consideration the Plaintiff permitted the Defendant to kill Sheep in his Passage, he promised to pay 30 s. per Ann. Verdict for the Plaintiff, and Error brought. It was objected, that this being for Rent upon Lease, an *Indebitatus Assumpsit* would not lie, but a *Quantum meruit*. *Parker com.*: It has been held that an *Indebitatus Assumpsit* (144.)

Where an *Indebitatus Assumpsit* lies for Rent.



*Assumpsit* does not lie for Rent *secundum ratam*. 4 Mod. 78. But where it is upon an express Promise for an Easement, &c. *Indebitatus Assumpsit* is the proper Action. *Hard. 366. 3 Mod. 240.*

*Cur*: This is not a Lease which passes any Interest or Property in the Soil, but is grounded upon an express Promise for an Easement, and *Indebitatus Assumpsit* is a proper Action in such Cases. Judgment affirmed.

Spencer *ver.* Donally, Hil. 7 Geo. II.

(145.)  
Variance between the Recognizance and Bail-piece.

**A**CTION against John Donally, Esq; and in the Bail-piece named John Donally, Gent. but Recognizance was taken by the Name of John Donally, Esq; and so a Variance from the Bail-piece. *Scire facias* against the Bail upon this Recognizance, and the Master entered a *Protulit Recordum*. Kettleby moved to make the Record agreeable to the Bail-piece, and the Court gave him leave to do it, tho' it made a Variance between the Recognizance and the Original Action; for *per Cur* the Plaintiff should have taken Advantage of it before, for there was no Bail to the Action, as this Bail-piece is taken; you cannot enter a Recognizance different from the Bail-piece, and there being no final Judgment on the Nul tiel Record, the Entry of the *Protulit Recordum* must be set aside.

Wells *ver.* Kitchinson, Hil. 7 Geo. II.

(146.)  
Mistake in the Teste of a *Scire facias*.

**S**ECOND *Scire facias* upon a Judgment teste Philip Lord Hardwicke, 21 November, &c. returnable the first Day of this Term. The Plaintiff prayed to amend by striking out the Words Philip Lord Hardwicke, and inserting the Words Sir Philip York, Knt. [Note; the Lord Chief Justice's Patent of Peerage was dated 23 Novemb. 1733.] There was cited Blackmore's Case, 8 Rep. 156. Cro. Eliz. 183, 203. Tho. Jones 41. Pasch. 1 Geo. 2. Ginchy *versus* Costen. Ca. Sa. taken out upon Affirmance of a Judgment tested 13 February, but upon Motion the Teste was amended and made 12. So Mich. 12 Geo. 1. Hughes *versus* Alvarez, Motion to amend a Writ of Enquiry after executed; this was an Action of *Assumpsit* upon two Promises, the Inquest gave Damages upon the first Promise only, and the Entry was *occasione premissor*, which

Words were struck out, and Entry was *occasione prime promissionis*. Cro. Car. 147. 2 Bulf. 35. 1 Roll. Abr. 201: Mod. Caf. 263, 310. 1 Salk. 52, 49. Cro. Jac. 372. This is a judicial Writ, and under the Controul of the Court; *sed adjournatur*, Mr. S. desiring Time to look into Cases:

Desbordes *ver.* Horsey, Hil. 7 Geo. II.

B. R.

**D**EBT upon Bond conditioned to pay so much Money (147.) as was mentioned to be due in such a particular Deed; after Judgment the Defendant brought Error, but no Bail was entred according to the Statute 3 Jac. 1. c. 8. Writ of Error on a Judgment upon a Bond for Payment of Money only, is no *Superfedeas*, unless Bail be put in: Afterwards the Plaintiff sued out a *Ca. Sa.* by Virtue whereof he took the Defendant in Execution, who now mov'd to be discharged, having brought Error before the *Ca. Sa.* was sued out.

S. Counsel *econ.* A Writ of Error is no *Superfedeas* to a Judgment in Debt upon a Bond for Payment of Money only, as in the present Case, except Bail be put in; and of this Opinion was the Court, and so the Motion was denied.

Law *versus* Law, Hil. 7 Geo. II.

B. R.

**I**N Debt upon Bond the Defendant pleaded *Solvit ad diem*. (148.) Mr. F. Counsel, mov'd to withdraw this Plea, and plead the 5 & 6 Edw. 6. c. 16. concerning the Sale of Offices. Motion to waive Plea of *Solvit ad diem* to a Bond, and plead the Stat. 5 & 6 Edw. 6.

The Court inclined strongly against the Motion, but at last he cited the Case of *Meard versus Philips*, Trin. 5 Geo. 2. where the Defendant pleaded *Nil debet* to a Bond, and after Special Demurrer, and Joinder in Demurrer, the Court gave leave to withdraw the Plea, and plead two Special Matters in Bar; and the Reason upon which the Motion was founded was, that the Judges were gone out of Town, it being in *Whitsun* Holydays; and therefore the Defendant was obliged to join in Demurrer.

This is a stronger Case than the Case at Bar, being after Joinder in Demurrer, and here all is in the Paper, and the Plaintiff has not replied. *Rule to shew Cause.*



## Crompton versus Deen, Hil. 7 Geo. II. B. R.

(149.)  
A Debtor taking Benefit of Stat. 2 Geo. 2. for Relief of Insolvent Debtors, obliged to give Notice to Creditors residing within ten Miles, &c.

**ACTION** by Indorsee of a Bill of Exchange; the Defendant pleads the Statute 2 Geo. 2. "*Intituled an Act for Relief of Insolvent Debtors*," and that he was legally discharged at the Sessions.

The Plaintiff replies he is a Creditor, and had no Notice *secundum formam Stat.*; the Defendant rejoins that he had no Notice of the Indorsement; and upon Demurrer the Question was, whether the Defendant was obliged to give Notice.

Mr. B. for the Plaintiff cited 4 Rep. 82. b. 8 Rep. 92. 1 Roll. Abr. 469. D. p. 1.

A. econ. cited Hob. 51. Holmes versus Twist. Hob. 68. Richards versus Carvameil. Cro. Car. 571. Cro. Jac. 493. 1 Leon. 105. Salk. 457.

H. C. J. This Question arises upon a Construction of the Act of Parliament, and does not fall within the Rules of Law; and there is no Question but at Law he who is to take Benefit of a Condition, and is privy, must give Notice.

It appears evidently, that the Plaintiff is a Creditor, and he has replied Specially according to the Act, that he is residing within ten Miles, and had no Notice.

As to the Defendant's Notice of the Indorsement, it is not material, for he has taken upon himself to be responsible to the Indorsee at all Events; and the Words of the Act of Parliament are express, *that he shall give Notice to all his Creditors.*

What is said by the Defendant in this Case might be said in all other Cases; suppose a Creditor dies, is it sufficient for the Defendant to say he did not know, or had no Notice, who was his Executor or Administrator?

Not necessary to give any Opinion as to the Form of Pleading, for Rejoinder is perfectly immaterial.

P. J. The Defendant has made himself responsible to the Drawee or Order, and therefore 'tis at his own Peril to take Notice of the Indorsement; he is to have the Benefit of the Act of Parliament, and ought to comply with the Terms; this is stronger than the Case of a Bond, and yet in that Case the Obligor is at his Peril to give Notice.

P. and L. Justices, to the same Effect. *Judgment for the Plaintiff.*

Hoare *versus* Gates, Hil. 7 Geo. II.  
B. R. *Vide ante* Case 32, 39.

IN *Assumpsit* the Defendant pleads *Non Assumpsit infra* (150.) *sex Annos*. The Plaintiff replies, that he took out a Bill of *Middlesex* in such a Term, and avers *quod causa Actionis accrevit infra sex Annos ante prosecutionem Bille predict.* To this the Defendant rejoins, that the Bill of *Middlesex* issued *post clausum Terminum*, and altho' Bills issuing out in Vacation are entred as of the last Day of the Term preceding, yet *de facto*, and *in rei veritate*, the Bill of *Middlesex* issued *post clausum Termini*, viz. on such a Day; and concludes, *Quod causa Actionis non accrevit, &c.*

Rejoinder,  
Averring the  
Bill of *Middlesex* issued  
in the Va-  
cation.

To this the Plaintiff demurred, for that an Averment in those Cases was not to be allowed, and cited *Latch* 233. *T. Jones* 149. 1 *Lev.* 214. 1 *Sid.* 53, 60. 1 *Roll. Abr.* 893. p. 4. 1 *Mod.* 188. *Cro. E.* 181. *Stiles* 156. *Carth.* 232. *Show.* 253. 4 *Mod.* 129. 3 *Lev.* 28. *Carth.* 227. *Hob.* 156, 297. *Pasch.* 5 Geo. 2. *Jones versus Bennet.* *Assumpsit* upon a promissory Note by Indorsee; the Defendant pleaded he was attached the 12th of *February*, and that the Note was not indorsed till after that Day. The Plaintiff replies, that *de facto*, and *in rei veritate*, the Attachment issued the 25th of *March* following, and that before that Time the Note was indorsed; and upon Demurrer the Averment was over-ruled.

So *Pasch.* 2 Geo. 2. *Eastwick versus Coke*, upon Demurrer Averment was held naught. *Michaelmas* 4 Geo. 2. *Fuller versus Foslyn*, Lady *Twisden* gave a Warrant of Attorney to confess Judgment, but died in *Easter Term*, before Judgment was entred on the Roll. Judgment was afterwards entred up in the same Term, and was held good, because the whole Term is but one Day in Law, and so the Entry was previous to her Death.

On the other Side it was argued, that this Relation was a meer Fiction in Law, and would admit of an Averment. 2 *Keb.* 173, 198. 3 *Keb.* 213, 214. *Cro. Jac.* 561. *Cro. Car.* 264. 1 *Roll. Abr.* 258. p. 4. That this Fiction was contrary to the express Words of an Act of Parliament, and therefore an Averment might be made.

*W. Serjeant*, argued for the Demurrer. It is admitted that by the Course of the Court, and in Point of Law, a Bill of *Middlesex* sued out in Vacation, is a Writ of the preceding Term; but the Objection is, that this is a meer Fiction,



tion, and must give way to the Averment. How does it appear to be a Fiction? It does not appear upon the Record to be a Fiction, and a Record is of so high a Nature, and imports in itself such an absolute Truth, as to admit of no Averment to the contrary. 1 *Inst.* 117. b. 168.

This Averment is destructive of the Record, for if it should be made to issue out of Term, the Writ is void. *Salk.* 700. *Carth.* 70. The Averment therefore is contrary to the Bill itself, and shall not be admitted as in 2 *Rep.* 4. *Goddard's* Case, he is stopt to make Averment against what is express in the Record. *Skin.* 32. And the Reason is, because it tends to falsify the Record; *a fortiori*, where it tends to destroy the Record, as in the present Case. The Reason why a Bill of *Middlesex* has no *Teste* is, because it is the Act of the Court *sedente Curia*, and the whole Term in Judgment of Law is but one Day, and was once thought so considerable that it could not be divided. *Yelo.* 35. It is now indeed otherwise, for the Plaintiff may by a special Memorandum shew the particular Day when the Bill issued; but this is not repugnant to the Record, for it is still a Bill of that Term. And in *Fuller* and *Fosslyn's* Case it was held, that a Judgment entered at any Time in Term is a Judgment of the first Day of that Term; and this Fiction is so well established, it will admit of no Averment to the contrary. 1 *Salk.* 401. *T. Jones* 150. The Statute of Limitations can make no Difference, that Act has been made ever since 21 *Jac.* 1. and no one Precedent that an Averment of this kind was ever admitted, & *quod in facto est inusitatum, in jure reprobatur*. There was a Case argued in the Exchequer, the Case of *King* versus *Man*, which comes up pretty near to the Point in Question. The 5th of *October*, 7 *Geo.* 1. Baron *Price* granted his *Fiat* during the Vacation for an Extent, which was had accordingly, tested the last Day of the preceding Term. Upon this Extent the Defendant's Goods were taken in Execution; the Defendant craved *Oyer* of the Extent, and pleaded that the *Fiat* was obtained the 5th of *October*, and that the Extent, *de facto* & *in rei veritate*, issued on that Day; but the Court was of Opinion that the *Teste* was binding. There another Question arose indeed as to the Regularity of issuing *Fiats* in Vacation; and upon Motion as to that Point, the Court held it irregular. But as to the *Teste*, this is a Case in Point, and shews that an Averment contrary to the Record cannot be made.

*D. con.* This Averment makes no Inconsistency, the Statute of Limitations has always been considered as a beneficial Law, and the Words are, "That Process shall be commenced and sued;" which last Words mean not only *Emanatio*

*natio brevis*, but an Act to be done by the Party upon that Writ. It is clear, that at the Time of issuing the Bill of *Middlesex* the Statute was a Bar, it was his own Fault he did not commence his Action sooner, and he shall not come afterwards, and by a meer Fiction take Advantage of his own Laches, contrary to the exprefs Words of an Act of Parliament. The Cause of Action which the Plaintiff had was barred by the Statute, and the Issuing out of the Bill of *Middlesex* afterwards could not give him new Cause of Action by Relation.

If an Averment cannot be made, because in Fiction of Law a Bill sued out in Vacation is a Bill of the preceding Term, it is impossible to plead a Tender. 1 *Ventr.* 28. *Cro. Jac.* 561. 1 *Ventr.* 362. A *Latitat* may bear *Teste* before the Cause of Action commenced, and the Plaintiff may aver, that in Fact the *Latitat* issued in Vacation; by the same Reason the Defendant may aver the precise Time that in Fact the Bill of *Middlesex* issued. 2 *Keb.* 173, 175. 3 *Keb.* 212, 213. The Time when a *Latitat* issued out is traversable, and may be averred. *Cro. Car.* 264. *Roll. Abr.* 538. The Averment does not destroy the Record, it only goes to the Time in which it issued, but does not deny that there was such Process. The Case in *Lutw.* 329. is not like the present Case, that was concerning a Judicial Writ, which has a *Teste*, but a Bill of *Middlesex* has no *Teste*, and the Averment is to meer Matter of Fact only, and Issue may be taken upon it.

H. C. J. If in Point of Law such an Averment can be made, it is pretty extraordinary this Case has not come in Question before. In the Case of Original Writs out of Chancery, the *Teste* is often preceding the Time that in Fact they are sued out upon, and so are allow'd by Course of the Court. There is no great Difference between an Original and a Bill of *Middlesex*, in Point of Law; the Original has a *Teste*, and the particular Day on which it issues appears; and so it is in Fact in the Case of a Bill of *Middlesex*, for the Term in which it issues appears, and in Judgment of Law the whole Term is but one Day; this Fiction does not support a Wrong, but rather goes in Aid of the Party to recover his just Debt. Consider the Case of a Judgment, the Fiction in Law was in that Case so strong even in Case of Purchasers *bona fide*, that there was forced to be an Act of Parliament to restrain it. There can be no great Inconvenience if the Averment in the present Case be disallowed, the most it can extend to is the Statute of Limitations, which in this Case is only for a Vacation, and that seems a less Inconvenience than to overturn a settled Rule of Law.



P. J. He cited *Maynard* 134. 3 *Keb.* 213. *Chancy* and *Rutter*. If Averments cannot be made, it will introduce many Inconveniences; as in Case of a Tender, where a Man is justly indebted, and tenders the Money at the Day, and the Party refuses; can he afterwards have his Action, and by a Fiction in Law avoid the Tender? Where indeed an Action is brought against an Officer, he shall take Benefit of the Fiction, but that is to avoid a Wrong.

P. J. A Bill of *Middlesex* cannot issue but in Term, and therefore when it is taken out in Vacation, it must of Necessity have Relation to the preceding Term, or it is void; and this in Effect is the Substance of the Averment, for if the Averment stands, it destroys the Writ.

L. J. In *Raym.* 161. *Bilton* versus *Johnson*, which was an Action of false Imprisonment, the same Objections were made as in this Case; but it was held, that altho' the *Teste* of the Writ was upon Record, and the Plaintiff cannot aver against it, yet there would be great Inconveniences if the Plaintiff cannot set forth the very Time of the Purchase of the Writ, and the Relation of the *Teste* is only to prevent Fraud, and not justify a Tort. This comes up to the present Question, where the Defendant's Defence arises from the Statute of Limitations, whether we are to suffer the Statute to be eluded by supporting this Fiction; and if the Act of Parliament is considered, the Sense of it seems to be not where a Man sues out Process only, which is the Precept of the Court, but where he sues it with Effect. *Adjournatur* to be spoke to again. *Vide* 4 *Rep.* 71. a. b. *Hind's Case.* 2 *Salk.* 650. *Lazier* versus *Dyer*.

## Storey ver. Gardner, Hil. 7 Geo. II. B. R.

(151.)  
Verdict find-  
ing only  
Part of the  
Issue.

**T**RESPASS for entring and carrying away his Cattle; the Defendant, as to Part of the Cattle, pleads Not guilty; and as to breaking and entring his Close, and carrying away the Rest of the Cattle, he justifies for Distress of Rent in Arrear. The Plaintiff replies, *de injuria sua propria*, and Verdict for the Plaintiff.

*Taylor* mov'd in Arrest of Judgment, that the Verdict was imperfect, for here are two Issues, and the Jury have only found, that the Defendant did of his own Wrong enter and carry away the Cattle mentioned in the Justification *inter alia Averia*, but as to Part of the Cattle mentioned in the Plea of Not guilty, there is no Finding at all as to that.

Parker

*Parker econ.* If the Jury have given less Damages than they ought, it is to the Detriment of the Plaintiff, and the Defendant cannot take Advantage in Arrest of Judgment of a Verdict that is apparently for his Benefit; the Jury have found that he entred *de injuria sua propria*, and drove away the Cattle *inter alia averia*, which is sufficient after Verdict.

*Cur'*: A Verdict may cure an insufficient Declaration, but it cannot help itself; the Objection is very material, for the Verdict does not determine the Matter put in Issue between the Parties: Suppose a new Action to be brought for the Cattle mentioned in the Plea of Not guilty, what can the Defendant plead? He cannot plead this Judgment in Bar, for there is no Finding upon the Not guilty; neither is there any Action depending. And *H. C. J.* said, it was such a Verdict that the Court ought not to give Judgment upon it. The Plaintiff desired further Time to search into it, for the Record may be amended here, and the Verdict below; and *sic adjournatur*.

## The King *versus* Theedham, Hil. 7 Geo. II. B. R.

**I**nformation for an Assault, and the Parties at Issue; but (152.) the Prosecutor did not proceed to Trial within three Years, being the Time prescribed by Act of Parliament. *K.* now moved for Costs against the Prosecutor, but not having an Affidavit to verify the Fact, the Motion was denied.

Costs against the Prosecutor of an Information for not going to Trial in three Years.

## Devenish *ver.* Barton, Hil. 7 Geo. II. B. R.

**B.** Serjeant, mov'd for double Costs upon Statute 7 Jac. I. (153.) This was an Action against a Justice of Peace for taking away the Plaintiff's Gun.

The Plaintiff discontinued, and there was an Affidavit produced, that the Defendant was a Justice of Peace.

*Cur'*: There ought to be a Suggestion of this Matter on the Roll; and *per Lee*, it was so determined in the Case of *Cooper versus Cathurall*, which was upon a Nonsuit. It was then pray'd that the Roll might be brought into Court, and the Suggestion entered.

(153.) To intitle a Justice of Peace to double Costs on an Action brought against him, it ought to be suggested on Record, that he was a Justice of Peace.

*H.*



*H.* opposed the Motion, because it did not appear by the Affidavit, that he acted in the Affair in Capacity of Justice of Peace.

*Cur.*: Shew Cause why the Defendant should not have Leave to enter the Suggestion upon the Roll, and have double Costs; and there was cited the Case of the *King ver. Colan*. Indictment for exercising the Trade, &c. and not having served seven Years Apprenticeship. The Defendant pleaded Not guilty, and gave in Evidence that he was a Soldier, and having served so many Years as the Act of Parliament required in those Cases, he was intitled, by Virtue thereof, to exercise any Trade without Service; and was also intitled by the same Act to double Costs, but neglected at the Trial to get the Judge's Certificate: He afterwards came and applied to this Court, and had a Rule to suggest this Matter upon the Roll, and then had double Costs allowed him. *Trin. 3 Geo. 1. King versus Colan.*

### Cumber versus Hill, Hil. 7 Geo. II.

*A. B. R.*

(154) *As to cross Remainders.* IN Ejectment the Jury found a Special Verdict to this Effect: "*Richard Holden* the Grandfather died seised of several Lands, Tenements, &c. in Fee, having by Will devised the same to his Grandson *Richard Holden*, and *Elizabeth* his Grandaughter, to be equally divided amongst them, and to the Heirs of their respective Bodies; and for Default of such Issue, the Remainder to his Grandaughter *Anne Holden* in Fee." *Anne* marries *John Jarvey*, and afterwards *Elizabeth* dies without Issue of her Body. The Question was, whether *Richard Holden* and *Elizabeth* took an Estate in common, with cross Remainders to the Heirs of their Bodies; for then the Estate could not vest in *Anne*, but upon Failure of Issue of both their Bodies. Or whether this was an Estate in common, with Remainder to the Heirs of their Bodies generally; for in that Case one Moiety of the Estate would vest in *Anne*, who had the Remainder in Fee immediately upon the Death of either of them without Issue.

*B.* Serjeant argued, that this was not an Estate in common, but in Special Tail, by reason of the Possibility that *R.* and *E.* might have Issue between them: For if Lands are given to a Man that has a Wife, and to a Woman that has a Husband, and the Heirs of their two Bodies, they have

have presently an Estate-Tail, for the Possibility that they may marry. 1 *Inst.* 20. b. 25. b. But admitting in this Case that they are Tenants in Common only, yet they are Tenants in Common, with cross Remainders to the Issue of their Bodies; for the Words are, "That in Default of such Issue the Estate shall remain over;" and there can be no Failure of Issue so long as either of them has Issue of his Body. And it was expressly adjudged in the Case of *Holmes* versus *Meynel*. *Raym.* 452. S. C. *T. Jones* 172. S. C. *Skinner* 17. S. C. And there is no Difference between this and the present Case, except in this Case the Words (*equally to be divided*) precede the Word (*Heirs*) and in that Case they are subsequent. There is also a Case in 4 *Leon.* 14. c. 51. directly in Point. *Vide* this Case cited *Raym.* 454. in the Case of *Holmes* versus *Meynel*. There are two Cases in the Books which seem to impugn this Resolution, one in 2 *Cro.* 655. *Gilbert* versus *Witty*, the other in 2 *Roll. Abr.* 416. T. p. 3. But the first of these Cases is answered in the Case of *Holmes* versus *Meynel*, and the other in *Roll. Abr.* is expressly denied to be Law. *Vide Raym.* 455.

D. Serjeant, *econ.* There is no Case cited in Point to prove this a cross Remainder: The Case of *Holmes* versus *Meynel* widely differs; for the Devise there is of "All the Testator's Lands to his two Daughters, &c." and if they happen to die without Issue, then he devises all his said Lands, &c. And the Reason of the Judgment in that Case is, because the Devise over was of (*all*) his Lands; and in Case (*they*) die without Issue, *i. e.* both of his Daughters, so likewise the Devise over in that Case was to a Stranger, but here it is to one *in aquali jure* with the first Devisees. As to the Case in *Leon.* the Devise was to his Sons in Tail, and in Case they died without Issue, that then the (*whole*) Land should remain to a Stranger in Fee; here the Remainder was to a Stranger also, and the Word (*whole*) shew, that all his Estate should pass together, and not by Parts and in Moieties; and the whole Land could not pass till all the Sons were dead without Issue. As to the other Objection, that this is an Estate in Special Tail, because there is a Possibility of their having Issue between them, the Supposition is not only absurd in itself, but likewise is too distant and remote a Possibility for the Law to expect.

H. C. J. The Construction of cross Remainders has been extended of late Years, and the Distinctions upon which they have been determined are pretty nice. There is no Doubt but if this Case cannot be distinguished from the Case of *Holmes* versus *Meynel*, but that Case will govern the present Question; for it was determined upon great Authority



and mature Consideration. The present Case is a Devise to *Richard* and *Elizabeth*, and the Heirs of their respective Bodies, which gives them an Estate in common in Tail general; and the rather by Reason of the Word (*respective*) for it is now the same as if the Devise had been of one Moiety to his Grandson *Richard* and the Heirs of his Body, and of the other Moiety to his Grandaughter *Elizabeth* and the Heirs of her Body: And then follows, "And for Default of such Issue, *i. e.* upon Failure of Issue of either of them, the Remainder over." In the Case of *Holmes* versus *Meynel*, the Testator's Intentions appear to be clearly, that the Remainder-Man should not take, but upon Failure of Issue by both his Daughters, for the Words, "And in Case they," *i. e.* both his Daughters, should die without Issue, that then (*all*) his Lands should remain over, so that by express Words the Remainder was not to vest but upon Failure of Issue by both the Daughters, and in that Case all his Lands were to remain over. In all Cases where the Devise is to two and the Heirs of their respective Bodies, these Words create immediate Remainders; and the Words following, *viz.* "And in Default of such Issue;" these Words can make no Alteration, nor is there any Case where they have been construed to create cross Remainders. *See adjournatur* to be spoke to again.

### The King against Hooper, Hil. 7 Geo. II. B. R.

(155.)  
Information  
for Assault  
and Impri-  
sonment in  
*Newfound-*  
*land* denied,  
being Local.

THE Defendant, being a Captain of a Ship, carried *Wills* a Sailor into *Newfoundland*, which Country is Part of his Majesty's Dominions; and there, by the Assistance of some *Spaniards*, imprisoned and laid him in Irons, and likewise treated him in a most barbarous Manner.

Mr. H. upon these Circumstances mov'd for an Information against the Defendant.

H. C. J. Where would you try this Information? all Criminal Prosecutions are Local; you may bring your Action, but cannot try this by way of Information. There is an Act of Parliament made in King *William's* Reign, which gives an Information against Governors for Misdemeanors in foreign Plantations; but this Case is not within that Statute. *Motion denied per Cur'.*

Hooker

## Hooker *ver.* Hooker, Hil. 7 Geo. II. B. R.

**T**HIS Case was sent out of the Chancery for the Opinion of the Judges of this Court, and was in Effect to <sup>(156.)</sup> Dower. this Purpose.

*J. B.* by Lease and Release conveyed certain Lands to Trustees in Fee, to the Use of the Trustees and their Heirs during the Life of *William Hooker, Sen.* Remainder to *William Hooker* the Younger for Life, Remainder to his first and every other Son in Tail Male, Remainder to his Daughters in Tail, Remainder to the right Heirs of *William Hooker, Sen.* Upon the Death of *William Hooker* the Elder, *William Hooker* the Younger enters, and marries the Plaintiff, but died without Issue; the Question was, whether his Widow the Plaintiff was intitled to Dower? The Contingent Remainders were arising, and both the Estate for Life and Remainder in Fee vested in him at the Time of his Death.

*B. Serjeant* for the Plaintiff: Upon the Death of *W. H. Sen.* the Fee-simple descended to *W.* the Younger his Son and Heir, but whether the Fee comes to him by Descent, or by way of Remainder, is not material; for both Estates being vested and united in him at the same Time, was a Merger of the Estate for Life, and he died seised of the Fee-simple. Admitted that where an Estate for Life, with Remainder in Fee, are limited by one and the same Conveyance, and both consolidated, yet they may open again to let in Contingent Remainders, as in *Lewis Bowles's Case*, 11 *Rep.* 80. But this Matter is out of the Deed, for the Fee did not come to *William Hooker* the Younger intirely by the Deed, but by the Death of *William* the Elder, he happening to be his Heir. The Limitation to the first and every other Son of *William* the Younger was a Remainder in Contingency, and he having no Issue at the Death of *William* the Elder, that Contingency was destroyed, and could never vest afterwards, but he became seised of an absolute Estate in Fee; but admitting the Contingency to subsist, yet as it never came *in esse* during the Life of *William* the Younger, he died seised in Fee, and so his Feme became intitled to Dower. Estates in Dower are much favoured in Law, and a Feme shall be indowed of a base Fee, as in *Seymour's Case*, 10 *Rep.* 95. So if a Disseisor die seised, his Widow shall have Dower so long as the Disseisin continues. But he insisted upon the first Point, that the Fee coming to *William* the Younger by the Death



Death of *William Hooker* the Elder, the Contingent Remainders were destroyed, and relied upon the Case of *Kent versus Harpool*. 1 Vent. 306. *T. Jones* 76. S. C. 3 Keb. 380. The Father Tenant for Life, Remainder to the Son for Life; Remainder to the first Son of that Son, (who was not born) Remainder to the Heirs of the Body of the Father; the Father died before the first Son was born; and held the Descent of the Intail to the Son had destroyed the Contingent Remainders.

*F. econ.* The Question is, whether *William Hooker* the Younger was seised of such an absolute Estate at all Events as will intitle the Feme to Dower? Here is no Estate limited to *William Hooker, Sen.* but the Remainder is to his Heirs, so that when his Heir takes, he must take by way of Purchase. *William* the Younger does not claim the Fee by Descent, but by Virtue of the Conveyance; and if it should be look'd upon as a Merger, it is defeating the Intent of the Donor; and this Distinction is made in *Wiscot's Case*, 2 Rep. 61. When an Estate for Life, and the Fee-simple is limited by the same Conveyance, both Estates may stand together; but when the Fee descends, or comes by Purchase, in either of these Cases the Estate for Life is merged. This may be compared to the Case of *Plunket and Holmes*, Raym. 28. which was a Devise to *Thomas* for Life, with a Remainder to him in Fee upon a Contingency, which likewise descended to him by the Death of the Devisor; and yet it was said, that this should not confound the Estate for Life; which shews clearly, that altho' the Estates are in some sort consolidated until the Contingency happen, yet they are not consolidated to all Manner of Purposes, and therefore the Feme not intitled to Dower. This is to be considered as two distinct Estates vested in *William Hooker* at the same Time; for if a Son be born during his Life, or after his Death, the Feme could not have Dower. If such a Construction, as is contended for, should prevail, it would introduce great Confusion; for suppose the Husband dies, and his Wife brings a Writ of Dower and recovers, afterwards a Son is born, her Estate in Dower must be defeated. The Case of *Boothby versus Vernon*, Pasch. 11 Geo. 1. is in Point, and notwithstanding the Feme was seised in Fee all the Time of her Marriage, yet because there was an intermediate Estate which took Effect during her Life, it was held, the Husband was not intitled as Tenant by the Curtesy. 1 Roll. Abr. 676. F. 1. B. seised in Fee of a defeazable Estate, takes Feme and dies, afterwards the Estate is defeated, his Wife shall not be endowed. So 1 Roll. Abr. 677. b. Lessee for Life, Reversion to the Husband in Fee, Lessee lets the Land to

the Husband for Life of the Husband, afterwards the Husband dies, then the Lessee dies; the Feme shall not be endowed, because there was a Possibility of Reversion during the Coverture as to the Freehold; so in the present Case there is a Possibility that the Contingency may happen during the particular Estate, and therefore the Feme shall not be endowed. 1 *Inst.* 40. The Wife shall not be endowed but where the Issue by Possibility might inherit; but here the Issue could not inherit, but must take by Purchase; *Ergo* the Feme shall not be endowed.

H. C. J. The Question depends upon two Points, whether by the Death of *W. H.* the Elder, *W.* the Younger having then no Son, the Contingent Remainder was not destroyed; so that *William* the Younger was seised in Fee at all Events. And in the next Place suppose the Contingencies to subsist, whether the Possibility that they might happen, (but in Effect never did so,) will defeat the Wife of her Dower. As to the first, it seems to me that the Contingencies are destroy'd; where indeed an Estate is limited to *A.* for Life, Remainder to his first and every other Son, *Or* Remainder to *A.* in Fee; in that Case the Estate is to some Purposes consolidated, but not so as to destroy the Contingent Remainders, for *A.* claims both Estates by the same Conveyance. But there is no Case where the Fee comes prior to the Conveyance, that the Contingencies are not destroyed, as in the Case of *Kent* versus *Harpool*. So in 2 *Saunders* 380. *Puresoy* versus *Rogers*. 2 *Lev.* 39. S. C. Feme Tenant for Life, Remainder to her first Son, she takes a Husband, and before the Birth of the Son, he in Remainder in Fee conveys the Inheritance to Baron and Feme, then she has a Son and dies; the Son cannot take; for not being *in esse* when the particular Estate was destroyed, the Contingency can never arise afterwards. This is a middle Case, for the Fee neither came by Descent, nor yet intirely by Purchase; for tho' *W. H.* the Younger claims the Fee by Virtue of the Deed, yet it is by Matter meerly intrinsical, he happening to be Heir to *W. H.* the Elder, and so falls with the Reason of *Wiscot's* Case, and the other Cases which have been cited in Support of this Matter. But suppose the Estate for Life not to be absolutely merged, but that there still remained an *Hiatus* to let in the Contingencies, as in *Lewis Bowler's* Case, it is to be considered whether this Possibility will hinder the Wife's Title of Dower when the Contingency never happens. What do the Books say? that the Estates are consolidated, and that the Husband and Wife in such Case are Tenants in Special Tail. *Cordale's* Case in *Cro. Eliz.* 316. is the only Case which contradicts these Resolutions: And in



the Case of *Purefoy* versus *Rogers*, this Case was denied by *Holt* to be Law; and *H. C. J.* said: he had seen a Manuscript Note of that Case, and there it was said, that *Bridgman C. J.* denied *Cordale's* Case likewise. 13 *Lev.* 437. *Duncombe* versus *Duncombe*, in that Case a *Quere* is added by the Reporter, but it seems to be good Law, because there was an intermediate Estate limited to *F. S.* which hinders the Estates from joining? There is another Case to this Purpose, 15 *Ed.* 3. 4 & 5. And so concluded upon the whole, that *W. H.* the Elder dying before the Birth of a Son, the Contingency was destroyed; and in the next Place, if the Contingency was not destroyed, yet it never happening, the Feme was intitled to Dower. The Case of *Boothby* versus *Vernon* does not in the least impeach this Resolution; for in that Case *Anne* was only Tenant for Life, no Estate of Inheritance in her either absolute or liable to be divested.

*P. P.* and *L.* Justices, of the same Opinion. (157.)

### Kent ver. Kent & al. Hil. 7 Geo. II.

*B. R.*

(157.)  
Dower. Error brought by the Surviving Tenant, and the Heir of the other Tenant, whether Costs on Affirmance ought to be given against the Surviving Tenant only.

IN Dower, *unde nihil habet*, in Ireland, the Plaintiff had Judgment to recover a third Part of the Land, &c. and Damages, to the Time of Judgment. *May*, one of the Defendants, dies, and his Heir and the Surviving Tenant brought Error in *B. R.* there, where Judgment was affirmed, and Costs and Damages for the mean Seisin given against *Kent* only, whereupon *Kent* and *May's* Heir brought Error in this Court; and the Question was, whether the Judgment for Costs against *Kent* only was not erroneous.

*C. Serjeant*, for the Plaintiff in Error argued, that Damages to be recovered in Dower, by the Statute of *Merton*, are not a *Tempore Mortis* until Livery of Seisin, but from the Time of Purchasing the Writ *usque diem Judicii*; 1 Roll. Abr. 760. *B. Carth.* 133. But this Statute does not extend to Ireland. 1 *Sid.* 337. The Judgment therefore in the present Case must be founded upon 16 & 17 *Car.* 2. c. 8. 1, 3. And the express Words of this Act of Parliament are, "That the Plaintiff or Plaintiffs in Error shall pay such Costs and Damages as shall be awarded upon Affirmance of Judgment;" and in this Case there being two Plaintiffs in Error, it is not in the Power of the Court to give Judgment against one only; for they are to be considered in Nature of Wrong-doers, as in Trespass against two the Court cannot separate and give Costs and Damages against one only.

*Cur:*

*Cur.* The Question is, whether the Person, for whose Favour and Benefit the Judgment is, can bring Error? 5 Rep. 39. b.

C. Serj. Where the Error is by Default of the Court, altho' it be for the Advantage of the Party, yet the Party who has Benefit by it may assign it for Error; and to this Purpose cited *Tele.* 107. *Heines versus Guy.* 1 Roll. Abr. 759. 8 Rep. 59. *Beecher's Case.* 4 Leon. 61.

E. Serjeant *econ.* The Case cited out of *Siderfin* cannot be Law, for this Act of Parliament was previous to the famous Law called *Poining's Law*, which was 10 H. 7. But whether Damages are given by this Act of Parliament, or by 16 & 17 Car. 2. is not material, for the single Question is, whether Damages and Costs against *Kent* only, the surviving Tenant, makes this Judgment erroneous? And as to this Point he said, the Damages did survive, and are to be taken against *Kent* only, not by reason of Survivorship, but because the Heir is not chargeable with Damages recovered against his Ancestor. *Cro. Eliz.* 558. If there be a Recovery in a real Action of the Land and Damages, the Tenant against whom the Recovery is had dies, and the Heir who ought to have the Writ of Error in respect of the Lands will Release all Writs of Error, yet the Executor may sue a Writ of Error to avoid the Judgment for Damages, for the Heir was not chargeable in Damages, but the Executor. In Actions where no Damages and Costs are recoverable, no Damages to be paid *pro dilacione* as in a Writ of *Formedon*. So Executors pay no Costs or Damages, *pro dilacione.* 1 Vent. 166. 1 Mod. 7. 1 Ventr. 88. 3 Lev. 375. *Gale versus Till.* Carth. 135. The Statute 16 & 17 Car. 2. was made only to secure Costs for Delay of Execution in such Manner as they were before secured by 3 Jac. 1. c. 8. in Personal Actions; but Damages are given in Satisfaction of an Injury which are in Nature of a Trespass, and die with the Person, where the Person dies before Judgment was perfected. 3 Lev. 275. In this Case Damages for the mean Seisin are given to the Time of the Original Judgment, which was in the Life of the Ancestor, and the Heir is not answerable for Damages had against the Ancestor. The Judgment therefore against *Kent* for Damages for the mean Seisin and Costs for Delay in the Writ of Error, is a good Judgment; but if the Court is of Opinion that the Judgment is erroneous, he prayed the Court would give such Judgment as the Court in *Ireland* ought to have given. *Cro. Car.* 411, 442. This will alter our Security, and whereas now we have Remedy against one only, we shall in that Case have it against two. 11 Salk. 401.



C. Serj. in Reply: Damages are given for a new Wrong occasioned by the bringing of the Writ of Error, and delaying the Plaintiff of his Execution, and therefore all Parties concerned in the Wrong ought to be equally included in the Judgment. As to this Court's giving such Judgment as the Court in *Ireland* ought to have given, the Statute is, "That Judgment must be given by the Court which awards Execution;" and this Court cannot award Execution for Lands in *Ireland*; but upon Affirmance of Judgment this Court writes to the Court in *Ireland*, and thereupon Execution is awarded.

H. C. J. We will consider of it whether the Judgment is to be reversed, and if a new Judgment is to be given, in what Manner it must be done. *Vide 3 Rep. 13. b. In Herbert's Case.* If Judgment be against two Disseisors in Assise for Land and Damages, and one Disseisor dies, Execution shall not be awarded against the Surviving Disseisor only, but as well the Heir as the Surviving Disseisor shall be equally charged, but in Actions Personal it is otherwise. *Vide 3 Leo. 55. Graves versus Morley.* The Jury finding Part only is naught, and not cured by Verdict; and *vide* the Difference where the Whole is put in Issue, and where Part only; for in the last Case it is a Discontinuance, which is aided by Verdict. *3 Leo. 39, 40.*

### The King against Reeves, Hil. 7 Geo. II. B. R.

(158.)  
Prohibition  
on a Libel  
for Tithes.

**L**IBEL in the Spiritual Court for Tithes. The Plaintiff intitles himself, as Vicar, to all Tithes arising within the Vill, except Tithes of Corn growing upon particular Lands, said to be due to him either by Endowment, Custom or Prescription: As to Part the Defendant pleads Payment of an Annual Easter Offering of a Hen of the Value of 6 d. and 1 d. for Agistment of all unprofitable Cattle. After Sentence in the Spiritual Court, the Defendant comes and moves for a Prohibition, suggesting, that Tithes of unprofitable Cattle were due to the Rector or Impropiator, and not to the Vicar, Curate or Sequestrator.

L. Doctor of Laws: There is a material Difference between the Suggestion and the Pleadings below, 1 Vent. 335. Prohibition was prayed to a Suit for Tithes, upon a Suggestion that the Lands out of which they were demanded lay out of the Parish, and the Bounds of the Parish are triable at Common Law; but the Court denied the Prohibition,

tion, because it did not appear that a Plea thereof had been offered in the Ecclesiastical Court.

The Defendant likewise suggests, that the Plaintiff intitles himself by Custom, and that all Customs are triable at Common Law only; but Custom is only mentioned incidently, and the Plaintiff rests himself intirely upon the Endowment; and when the Foundation of the Suit is Spiritual, and Temporal Matter comes incidently in Question, the Ecclesiastical Court shall try the Temporal Matter, but shall try it as Courts of Common Law would. 2 Salk. 547. Shotter versus Friend. 3 Lev. 72. Bonsey versus Lee.

If the bare Mention of a Custom be Reason sufficient to grant a Prohibition, the Jurisdiction of the Spiritual Court will be absolutely overturned; for wherever the Libel is for Tithes, there is no Case but the Word Custom is mentioned.

Offerings are due by Custom only, and yet there is no Question but the Spiritual Court has a Jurisdiction in that Case, and so is the Statute 27 H. 8. c. 20. s. 1. *de circumspēte agatis*. 32 H. 8. c. 7. 2 Edw. 6. 13. Personal Tithes to be paid in such Manner and Form, as have been of Right yielded and paid within forty Years next before the making this Act, or of Right or by Custom ought to have been paid; here is a Custom to be tried, and yet there is no Question but a Suit in the Spiritual Court will lie upon this Statute.

This is after Sentence, and in that Case the Court always Judges favourably of the Proceedings in the Spiritual Court; if the Defendant has Reason to object to the Jurisdiction, he ought to have applied to this Court before Sentence. 1 Cro. 595. 2 Keb. 612. Noy 70.

In all Cases where this Court prohibits upon Sentence, it is where the Defect of Jurisdiction appears upon the Face of the Libel, and not by Reason of Matter suggested *dehors* the Libel; and so it was ruled in 1723. Wright versus Allen, upon Motion for Prohibition to the Admiralty.

B. Sen. on the same Side: To induce the Court to grant a Prohibition, it is suggested, that Agistment of all unprofitable Cattle have Time immemorial been paid to the Rector of Bishop Wilson, and not to the Vicar, Curate or Sequestrator.

Taking therefore this Matter upon their own Suggestion, there is no Reason to grant a Prohibition, for notwithstanding the Right in this Case is in Question, yet where it is a Right between Spiritual Persons only, a Prohibition shall not be granted. 13 Rep. *de modo decimandi*. 2 Roll. Abr. 310. Z. 1. 311. pl. 6.



*Cur.* The Reason of those Cases is where the Suit depending is between Ecclesiastical Persons, but in this Case the Rector is no Party, but the Parishioners.

*B.* Where Right is between Spiritual Persons only, whether the Person is a Party, or not, is not material. 2 *Roll. Abr.* 310. *pl.* 6. *God.* 149. 2 *Bulf.* 157. *Drayton* versus *Cotterill*.

In the Prohibition it is suggested, that the Tithes belong to the Rector, and not to the Vicar; as to the Jurisdiction therefore there is no Defect, but the Suggestion is *pro defectu Triationis*. 1 *Leon.* 59.

The Reason of granting Prohibitions where a Custom is pleaded, or the Suit is for a Duty arising by Custom, is, because in the Spiritual Court thirty or forty Years Usage is sufficient Evidence of a Custom or Prescription; which being contrary to the Rule of Common Law, that no Custom or Prescription can arise within Time of Memory, therefore the Common Law prohibits the Ecclesiastical Courts, where the Question arises upon a Custom. 2 *Bulf.* 157. But here the Suit is grounded upon the Endowment, whether by Endowment the Vicar is intitled; and the Custom only falls in as incident to the *Quantum*, how much is in Reality due for Tithes, and not whether Tithes generally is due by Custom.

Here is therefore in Nature of a common Libel for Tithes, in which Case no Prohibition goes, tho' the Plaintiff's Right to Tithes is denied. 2 *Keb.* 439. 1 *Vent.* 3. *Bishop of Lincoln* versus *Smith*. Libel for a Pension, to which the Plaintiff intitled himself by Prescription; and on Motion for a Prohibition, it was held by *Kelynge* and *Twisden*, that Pensions, tho' they are by Prescription, may be sued for in the Spiritual Court, for having Conuzance of the Principal, that shall draw in the Accessary, contrary to my Lord *Coke's* Opinion in 2 *Inst.* 491.

This being after Sentence, the Defendant comes too late; here is no want of Jurisdiction appearing upon the Face of the Libel, and the Distinction that runs in these Cases, is where the Objection to the Proceedings of the Ecclesiastical Judges is not *pro defectu Jurisdictionis*, but *Triationis*, and so is 1 *Show.* 158. *Shatter* versus *Friend*. Where there is want of Jurisdiction, Prohibition goes after Sentence, otherwise where the Suggestion goes to the Trial only.

*F. econ.* Where the Determination of the Spiritual Court extends to the Property of a Layman upon Matter not cognizable in that Court, it is not too late to come for a Prohibition altho' after Sentence.

Offerings are not due of common Right, but by Custom Time immemorial, and therefore not cognizable in the Spiritual Court, because it is admitted, that Evidence of a

Custom for thirty or forty Years is a good Foundation to establish a Custom in that Court; and this is the Reason of granting Prohibitions when a Custom comes in Question, that it may be tried whether this is such a Custom as is warranted by the Common Law.

In all Cases where there is want of Jurisdiction either in Right or Point of Trial, a Prohibition goes; but this does not conclude the Jurisdiction of the Spiritual Court, for if the Jury find in Favour of the Crown, a Consultation will be granted.

The Plaintiff intitles himself to Tithes either by Endowment, Custom or Prescription, which is too general, for it is not so much as suggested when this Endowment commenced, nor does it appear to be by Grant from the Rector, or with the Concurrence of the Ordinary, which is necessary to the Establishment of all Endowments, and if they go upon the Endowment in Fact, without relying upon the Custom or Prescription, they must shew it such an Endowment, as has all the Qualifications of an Endowment; all that is suggested in this Case is, that *Nich. de Ross*, Prebendary of Bishop *Wilson*, granted, &c. If the Plaintiff cannot intitle himself by Endowment, it must be by Prescription, which is triable at Common Law, and there only. 2 *Salk.* 548. If therefore it appears, that the Facts suggested in the Libel are cognizable only at Law, Prohibition in all Cases goes after Sentence, except where the Fact tried in the Spiritual Court did not arise within the Diocese. It is said that this is a Question of Right between Ecclesiastical Persons only, but the Fact is otherwise. It is a Suit for Tithes between the Vicar and the Parishioners, and it may prove inconvenient to carry this Rule too far, for there is no Reason why Ecclesiastical Persons should be excluded from trying their Right at Common Law; and he said the Case of *Smith* in 1 *Vent.* had been denied over and over again. There were several other Cases cited to shew that a Prohibition would lie. *Carth.* 97. *Broad* versus *Piper*. Prohibition after Sentence for a Mortuary. *Carth.* 33. *Vanacre* versus *Spleen*. Libel against the Defendant for not repairing Part of the Church Wall, which by Custom he was bound to do. A Prohibition was granted after Sentence, because a Custom is not triable in that Court. 1 *Salk.* 334. If the Custom is not denied, the Spiritual Court shall proceed, for there is no other Remedy; but if the Custom be denied, a Prohibition shall go, *Non propter defectum Jurisdictionis sed Triationis*. 3 *Keb.* 523, 527. 2 *Lutw.* 1059. *Thompson* versus *Davenport*. Customs triable at Common Law only. *Moore* 457. *Blinco* versus *Marson*. A Vicar libelled against the Parson for Tithes of Glebe, the Parson brought



brought a Prohibition, and held maintainable; and if a Special Custom be after Endowment of a Vicarage, it is issuable.

<sup>2</sup> Roll. Abr. 335. pl. 3. S. C. Litt. Rep. 263.

H. C. J. Where there is want of Jurisdiction, Prohibition goes after Sentence; where indeed a Person is cited out of his Diocese, and pleads to the Libel, no Prohibition goes, because there is no want of Jurisdiction; but a particular Privilege by the Statute, and the Defendant waives that, and answers to the Citation, he is by that Means concluded from taking Advantage of the Statute afterwards.

Offerings are due by Custom only, and when that comes in Question, a Prohibition must go: Suppose the Case of a *Modus* pleaded in the Spiritual Court, and denied, Prohibitions are always granted.

This is a Libel for Tithes of unprofitable Cattle, and the Plaintiff intitles himself either by Endowment, Custom or Prescription. The Court below has given Sentence for the Plaintiff; *sed non constat*, whether that Judgment was founded upon the Endowment, Custom or Prescription.

If there had been a particular Endowment alledged, and Judgment upon that, if it afterwards appears to this Court, that the Plaintiff had no Right to recover, Prohibition goes, tho' after Sentence.

This Case indeed is not so strong; for here is no particular Endowment alledged, and therefore must be intended to be given in Evidence; but the Objection that I have is, that it does not appear upon what Part of the Libel the Judgment is founded; whether upon the Endowment, Custom or Prescription separately, or upon all of them put together; and if such a general Way of Proceeding should be allowed, it would in a Manner defeat the Jurisdiction of the Common Law, as to Oblations, by suggesting generally an Endowment coupled with a Custom or Prescription; for if we should intend the Judgment to go singly upon the Endowment, (because that Word happens to be mentioned in the Libel) it must establish at all Events the Jurisdiction of the Spiritual Courts, with respect to Oblations; and perhaps at the same Time there was not one Syllable given in Evidence to support the Endowment, but the Sentence was intirely founded upon the Custom or Prescription, which are triable at the Common Law only.

L. J. It does not appear certainly, that there is want of Jurisdiction; for whether the Sentence is founded upon the Endowment or Custom does not appear upon the Face of the Proceedings; so doubted whether a Prohibition should go as to that Part.

But as to the Oblations; it is clear the Spiritual Court can have no Jurisdiction, for that is due only by Custom; indeed after the Custom is once established at Common Law, the Spiritual Court may proceed, which is all that is provided by the Statute *de circumspēcte agatis*.

P. and P. Justices, to the same Effect: Prohibition was granted to declare upon by Consent of the whole Court.

## Ashley ver. Branwood, Hil. 7 Geo. II.

### B. R.

**T**homas Entweizle seised in Fee devises to his eldest Son *A.* in Tail, Remainder to his second Son *T.* in Tail, Remainder to his third Son *E.* in Tail, Remainder to his own right Heirs. The Defendant pleads that *Thomas*, the Brother and Heir of *A.* made a Feoffment with Warranty, and that thereupon the Defendant entred. (159.)  
Error in Formedon.

The Plaintiff replies, that at the Time of the Feoffment there was a Lessee for Years in Possession; and to this the Defendant demurred. Judgment in the Common Pleas, *quod bona & sufficiens Replicatio existit*.

*W.* Serjeant argued for the Plaintiffs in Error, That the Plea was ill, for that it does not appear that *A.* was dead at the Time of the Feoffment by *Thomas*, nor is Seisin alledged in *Thomas* at the Time of the Feoffment. *Bro. Abr. Tit. Formedon, 4. Bar, 4. Pleading, 5. 1 Inst. 303. a. Raft. Entr. 361.* But if *Thomas* was seised, yet if Seisin was not by Virtue of the Will, it will not avail. *1 Roll. Abr. 634. 10 Rep. 97. Brooks's Abr. Tit. Formedon, 16.*

Collateral Warranty, which commences by Disseisin, no *Bar. 2 Salk. 686. 8 Rep. 53. 1 Inst. 352. b. Cro. Car. 391.* It is said tho' Seisin in *Thomas* be not expressly averred, yet it sufficiently appears from the Pleading, that *Thomas* was seised. *Thomas* is called Brother and Heir, and this is said to be sufficient, for *nemo est heres viventis*; but this is only a Consequence, and does not appear upon the Plea; the Estate-Tail might have been discontinued at the Time of the Feoffment, and therefore tho' *Thomas* was Heir at that Time, yet he might not have Seisin; but the Alledging *Thomas* to be Brother and Heir is quite immaterial, for he does not claim as Heir to *A.* but *per formam Doni*; therefore Heir, or not Heir, is totally immaterial. *Coke, Sett. 73. 2 Inst. 241.*



*B. Sen. con.* Not necessary in *Formedon* to alledge Seisin tho' it may be in *Affise*. *Brooke's Abr. Tit. Titles*, 59. Admitted that it was usual in Pleading *Formedons* to alledge Seisin, and that most of the Precedents are so; but the Question is, whether this is absolutely necessary, so that the Want of it makes Error? said what was alledged in Pleading was Tantamount to an Averment of Seisin; for it is said, that *Thomas* infeoffed *B.* by Virtue whereof *B.* was seised in Fee, and an Averment of a Feoffment, and that thereupon the Feoffee became seised, implies Seisin in the Feoffor. 1 *Inst.* 303. 18 *Ed.* 4. 29. *pl.* 27. Upon *Non Feoffavit* Coverture may be given in Evidence, to shew that it was not a corrupt Feoffment; by the same Reason Seisin may be given in Evidence. In all Cases where Feoffment is pleaded, Seisin must be proved in Evidence, or otherwise the Feoffment not effectual, and therefore the same Force as if put in Issue. It is objected, that, for any Thing that appears, Feoffment might be made in the Life-time of *A.* but it is said, *Thomas* Brother and Heir, which necessarily implies the Death of *A.* at the Time of the Feoffment. 3 *Lev.* 219. *Hob.* 51. *Dyer* 340. *Telo.* 27. *Existens* the same as *aditunc existens*. 2 *Mod.* 129.

Objected, that if the Seisin by *Thomas* was not a rightful Seisin at the Time of the Feoffment, the Warranty works no Discontinuance; but there are many Instances where Warranty shall bind, tho' no Seisin, as Collateral Warranty. 1 *Inst.* 375.

Collateral Warranty will bind without Assets, and Seisin not necessary. 1 *Inst.* 370. *a.* He that was Owner, and might have inherited his Warranty, shall bind. 1 *Inst.* 370. *a.*

*H. C. J.* There are two Questions, whether in Pleading a *Formedon*, it is necessary to alledge Seisin; and Secondly, whether this is not sufficiently shewn upon the Pleadings: The Feoffment, as pleaded, is a Feoffment with Collateral Warranty, and to make that effectual there must be an Alienation. Suppose in this Case there had been an Alienation by *A.* and after a Warranty by *Thomas*, the Estate at that Time being turned to a Right, and Warranty descending upon *E.* and his Heirs, is a good Bar; but this is not the present Case, for there is no Seisin alledged in *Thomas* at the Time of the Feoffment, nor no Appearance of an Alienation. It is therefore a Collateral Warranty without Alienation or Disseisin, and the Reason given in 1 *Inst.* why Collateral Warranty bars, is, because the Estate was turned to a Right at the Time of the Warranty; Feoffment will imply only Livery and Attornment, but never intends Seisin or Title in the Feoffor; for it must be alledged upon the Pleadings.

Pleadings. 2 *Vent.* 208. Brother and Heir is immaterial, and cannot import such a Seisin in *Thomas*, as is necessary. In Pleading nothing is to be intended, especially in this Case, which goes in Disinheritance of the Issue in Tail. The single Question is, whether Collateral Warranty can be pleaded in Bar, where the Estate was never turned to a Right. *Note*; the Replication was given up without Argument; *sed Quare*, if not good. A Man makes a Lease for Years, and afterwards a Deed of Feoffment, and delivers Seisin, the Lessee being in Possession, and not assenting to the Feoffment, the Livery is void; for albeit the Feoffor has the Freehold and Inheritance in him, yet it is not sufficient; for Livery must be given of the Possession also. 1 *Inst.* 48. b. 2 *Rep.* 31, 32. *Bettisworth's Case.* *Note*; in *Hilary Term* following Judgment was affirmed, with further Argument upon the Reasons, *ut supra*.

Cock *versus* Vivian, Hil. 7 Geo. II.  
B. R.

IN *Assumpsit* the Plaintiff laid several Counts in his Declaration, amongst which were an *Indebitatus Assumpsit* and a *Quantum Meruit* for Pckage and Stallage, and an *Indebitatus Assumpsit* and a *Quantum Meruit* for Toll; in Consideration that the Plaintiff had permitted the Defendant to expose his Corn to Sale in the Market, the Defendant promised to pay, &c. The Jury found for the Plaintiff, and gave Damages upon the whole Declaration generally; it was now mov'd in Arrest of Judgment by Mr. Hussy and Robinson, that the Verdict being general, if any one of the Counts were naught, the Plaintiff cannot have Judgment.

There are two material Objections to the Declaration; First, an *Indebitatus Assumpsit* will not lie but for a Sum certain; and Secondly, a *Quantum Meruit* lies not for a Sum certain; these Objections go to the Declaration in general, but in particular to the four last Counts; in the fifth and seventh the Plaintiff declares, that in Consideration the Plaintiff permitted the Defendant to expose his Corn to Sale, the Defendant promised to pay as much as should be due *secundum consuetudinem*. 2 *Inst.* 220. No Toll is due of common Right for Goods brought to a Fair or Market; unless they be sold, and then Toll to be taken of the Buyer; but in ancient Fairs and Markets Toll may be paid for the Standing, &c. tho' nothing be sold; but this is not good unless by Special Custom. A Man cannot prescribe for Toll for going along

(160.)  
Motion in  
Arrest of  
Judgment.

*Indebitatus Assumpsit* lies only for a Sum certain, *Quantum Meruit* for a Sum uncertain.



along the Highway, for it is against Common Law and common Right. 2 Roll. Abr. 322. 2 Lutw. 1336.

What was due is uncertain, and therefore an *Indebitatus Assumpsit* lies not; the common Method in those Cases is to distrain. *Indebitatus Assumpsit* never brought for a Heriot; the common Way is to seise or distrain. So in the Case of a Miller; the Plaintiff declares for so much Toll as was due *secundum consuetudinem*, and no Toll can be due by Custom. Custom is Local, and must always be applied to a certain Place; whereas the Plaintiff can have no Title but by Prescription, which is Personal, *i. e.* that he, and all those whose Estate he has, Time out of Mind had certain Toll, &c. *Vide 4 Rep. 31. b. 32. a.* As to the second Objection, a *Quantum Meruit* lies not for Toll; for Toll in its own Nature implies a Certainty. The Declaration is, *Quantum proinde rationabiliter habere meruerit*, without alledging any Custom; this implies a Duty indeed, but what that Duty is, must be ascertained by the Jury.

C. Serjeant *econ.* The Case cited in 2 Inst. 220. and Lutw. 1336. are not in Point for them. It is there held, that Toll for exposing Goods to Sale is not to be taken unless by Special Custom; we have here laid it specially, *secundum consuetudinem*, and so those Cases make for us.

The Case in Roll. Abr. for Toll for passing thro' the Highway, is not like the present Case; for that is against common Right, and no Custom can establish it.

*Assumpsit* lies not for a Heriot, or for Toll of a Mill; but even in those Cases, if the Plaintiff declares that in Consideration he permitted the Defendant to enjoy, &c. an *Assumpsit* lies; so in the Case of Toll, in Consideration the Plaintiff suffered the Defendant to carry away his Toll, he promised to pay what should be due *proinde secundum consuetudinem*. In 2 Inst. 220. Toll is said to be a reasonable Sum of Money due to the Owner of the Fair or Market upon Sale of Things tollable within the Fair or Market, or for Stallage, Pickage, or the like; so that the four last Counts are not to be confined to the Sale of Corn only, but for Stallage and Pickage also, which runs thro' the whole Declaration.

As to what is objected, that the Plaintiff cannot intitle himself to Toll by Custom, because Custom is Local. It is true in Pleading there is a Difference between Custom and Prescription. 2 Lut. 1322. 1 Vent. 389. 3 Keb. 677. But in this Case the Plaintiff does not intitle himself by Custom, but that the Defendant promised to pay what should be due *secundum consuetudinem*.

It is objected, that a *Quantum Meruit* does not lie for Toll; we have not brought it for the Toll itself, but in Consideration the Plaintiff had permitted him to expose, &c. the Defendant promised to pay *Quantum proinde habere meruit*; and this being laid to be at the Request of the Defendant, is *Quasi ex contractu*, and in Consideration of this Enjoyment.

Where Money or any other Thing is due from one to another, it implies a Contract, *Indebitatus Assumpsit* for a Customary Fine *pro tenementis secundum consuetudinem manerii*. 1 Show. 35. 3 Mod. 239. 3 Lev. 262. 2 Leon. 179. E. Counsel: *Indebitatus Assumpsit* will lie for Toll; for where any Thing is due, the Law implies a Promise. 2 Lev. 174. 3 Lev. 37.

Objected, that the Consideration is not good, for that no Toll is due for exposing Goods to Sale in a Fair or Market; if so, then the last Words are to be rejected, and it is a bare *Indebitatus Assumpsit* in Consideration the Plaintiff permitted the Defendant to enjoy the Toll, the Defendant *proinde* promised, &c. there is no Pretence to say, the *Quantum Meruit* lies not for Pickage and Stallage; and this is carried thro' all the Counts, according to Lord Coke's Description of the Word Toll. Here is a sufficient Consideration to raise a *Quantum Meruit*; for it is not for permitting him to expose to Sale in the Market generally, which the Defendant was intitled to of common Right, but for permitting him to expose his Goods in the Market-house, to which he had no common Right.

D. Counsel: *Tolnetum* is a general Word for Toll. 2 Lutw. 1518. Brook, Tit. Tally. 21. Toll may be paid in Specie as well as in Money; and *Quantum Meruit* lies for Pickage and Stallage, being a reasonable Satisfaction to the Lord for the Use of his Soil. 2 Lev. 252.

Action lies for Corn in Specie, as where a Man promises to deliver so many Bushels of Corn, *Assumpsit* lies for not delivering so many Bushels. Toll must be certain, but Pickage, &c. need not. It is nothing but a reasonable Satisfaction; and what is reasonable may well be put in issue. Plow. 63. Trespass upon the Case by the Lord of a Vill, *quod Tolloneum asportavit & illud solvere recusavit*. Objection was taken to the Writ, that he could not carry away the Toll, unless it was paid before; but yet the Writ was adjudged good; for altho' the first Words were void, yet the last, *viz. Et illud solvere recusavit*, are sufficient, which answers another Objection, that Toll may be paid as well by the Seller as Buyer. *Indebitatus Assumpsit* will lie in this Case, it is in Consideration of an Enjoyment, which is sufficient,



especially after Verdict; for then the Law intends it to be grounded upon an express Promise made between the Parties, as in *Hardress* 366. *Sir John Trevor versus Roberts*. *Indebitatus Assumpsit* to pay so much Money in Consideration the Plaintiff had licenced and permitted the Defendant to enjoy such Lands; after Verdict it was objected, that the Licence and Permission amounted to a Demise, and *ergo Debt ought to have been brought, and not an Action upon the Case*; but it was held, that upon an express Promise to pay Rent, *Assumpsit* would lie; and this being after Verdict, the Court would presume an express Promise; *Assumpsit* lies for a Copyhold Fine. 3 *Lev.* 261. *Shuttleworth versus Garnet*; and so was held by *Raymond C. J.* in *Capper's Case*. *Assumpsit* by the Mayor of *London* to have the 20th Part of the Salt of every Stranger who brought it to the Port of *London*; and tho' there is no Reason alledged why he should have that Part, yet the Mayor had Judgment. *Dyer* 352. b. 4 *Mod.* 322. and so ruled by *Baron Comyns*, that *Indebitatus Assumpsit* would lie for so many Bushels of Salt from every Ship.

*H. C. J.* Here are several Counts in this Declaration, and if any one Count is bad, the Plaintiff cannot have Judgment. The first Objection is, that the Demand is general for Toll of Goods exposed to Sale; and that the Defendant promised to pay as much as should be due, *secundum consuetudinem*; whereas Toll is to be taken for Goods sold only, and then not due by Custom, but Prescription. It is admitted, that by Special Custom Toll may be taken, tho' nothing be sold; and so the Plaintiff has laid it in his Declaration *secundum consuetudinem*. The other Part of the Objection seems indeed more material, that the Plaintiff cannot intitle himself by Custom, but by Prescription, the one being Local, the other Personal; and this requires farther Consideration. The next Objection is, that the Consideration is insufficient, and *Indebitatus Assumpsit* lies not for a Demand of this Nature, for that there is nothing in certain laid to be due, and *Indebitatus Assumpsit* lies not but for a Thing certain. This might have been a good Objection at another Time; but it is now after Verdict, and we must intend an express Promise proved at the Trial, for the Jury have found the Promise. The next Objection is to the *Quantum Meruit*, that it will not lie for a Thing certain, and that the Consideration to induce the Promise is not sufficient. Here are two *Quantum Meruits*, the first is in Consideration the Plaintiff had permitted the Defendant to bring his Corn into the Market-house, he promised to pay, *Quantum proinde meruit*; It is certain this Action lies not for a Certainty, and Toll for Goods

Goods sold in the Market generally must be certain; but in this Case here is something superadded to the Custom, it is not for Toll of Corn exposed to Sale in the Market generally, but for Leave to expose his Corn, &c. in the Market-house, which is *extra* the Custom, and may be good Consideration to raise the Promise. The most material Objection is to the last Count, which is a *Quantum Meruit* generally, *pro Tolneto pro granis illis, &c. locat' in Marketo predict'* *Quantum proinde rationabiliter habere meruerit*. To answer this Objection, it is said the *Tolnetum* includes Pickage and Stallage, and that this Word runs thro' the whole Declaration; but the Question is, whether it can be taken so upon the Face of the Declaration; for here the Plaintiff has himself distinguished in the Declaration between the Duty arising from Pickage and Stallage, and what was due for Toll of Corn; and the last Count is general for Toll of Corn *locat' in Marketo predict'*.

P. P. and L. Justices, to the same Effect. *Adjournatur* to be spoke to again.





**A**  
**T A B L E**

**O F T H E**  
**Principal Matters**

**I N T H E**  
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*Prisoners*

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